FILE COPY

Office-Supreme Court, U.S.
FILED
JUL 30 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 260

B. B. ROGERS, B. S. CORRELL, W. O. NEWELL, *et als.*,
Petitioners,

v.

THE DOUGLAS TOBACCO BOARD OF TRADE, INC., a corporation, *et als.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NORMAN M. LITTELL,
1826 Jefferson Place, N. W.,
Washington 6, D. C.,
Counsel for the Petitioners.

FREDERICK BERNAYS WIENER,
1025 Connecticut Avenue, N. W.,
Washington 6, D. C.,

CHARLES J. ALEXANDER,
1826 Jefferson Place, N. W.,
Washington 6, D. C.,

JOHN G. KOPP,
J. EDWIN PEAVY,
408-410 Bunn Building,
Waycross, Georgia,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	3
A. Summary of the Proceedings	3
B. The Douglas Market	5
C. Allocation of Selling Time	6
D. Change in the Board of Trade's By-Laws Consequent Upon Petitioners' Entry into Business	8
E. Effect of the New System on Petitioners' Business	10
1. The 1954 Tobacco Market Season	10
2. The 1955 Tobacco Market Season	11
3. The 1956 Tobacco Market Season	12
4. The 1957 Tobacco Market Season	13
5. Effect of the 3½% Limitation	14
F. The Rulings Below	15
Reasons for Granting the Writ	19
Conclusion	27
Appendix A—Opinions Below	A1
1. First Opinion, 244 F. 2d 478	A1
2. Second Opinion, 266 F. 2d 636	A24
Appendix B—Judgments Below	A39
1. First Judgment	A39
2. Second Judgment	A40

Page

CASES:

American Federation of Tobacco Growers v. *Neal*, 183 F. 2d 869 22
American Tobacco Co. v. *United States*, 328 U. S. 781 19
Asheville Tobacco Board of Trade, Inc. v. *F. T. C.*, 263 F. 2d 502 ..... 17, 18
Associated Press v. *United States*, 326 U. S. 1 ..... 22, 23, 25
Brown v. *Piper*, 91 U. S. 37 15
Chicago Board of Trade v. *United States*, 246 U. S. 231 ..... 16, 22
City of Lincoln v. *Power*, 151 U. S. 436 15
Currin v. *Wallace*, 306 U. S. 1 19
Day v. *Asheville Tobacco Board of Trade*, 242 N. C. 136, 87 S. E. 2d 18 16
Fashion Originators Guild v. *Federal Trade Comm.*, 312 U. S. 457 22
Federal Communications Comm. v. *RCA Communications*, 346 U. S. 86 16
Hudson Sales Corp. v. *Waldrip*, 211 F. 2d 268 ..... 16, 26
Interborough News Co. v. *Curtis Publishing Co.*, 127 F. Supp. 286 25
International Salt Co. v. *United States*, 332 U. S. 392 ..... 22, 25
Kinnear-Weed Corp. v. *Humble Oil & Refining Co.*, 214 F. 2d 891 ..... 16, 25, 26
Klor's v. *Broadway-Hale Stores*, 359 U. S. 207 ..... 4, 18, 21, 26
McFarland v. *American Sugar Ref. Co.*, 241 U. S. 79 22
Riedley v. *Hudson Motor Car Co.*, 82 F. Supp. 8 25
Shotkin v. *General Electric Co.*, 171 F. 2d 236 ..... 16, 25, 26
Southwestern Sugar v. *River Terms.*, 360 U. S. 411 20
Swift & Co. v. *United States*, 196 U. S. 375 24
Texas & P. R. Co. v. *Pottorff*, 291 U. S. 245 15
Townsend v. *Yeomans*, 301 U. S. 441 19
United States v. *Griffith*, 334 U. S. 100 23
United States v. *United States Smelting Co.*, 339 U. S. 186 20
Wilson Tobacco Board of Trade, Inc., In the Matter of, F. T. C. Docket No. 6262, August 23, 1956 22

STATUTES:

Sherman Antitrust Act, 15 U. S. C. §§ 1, 2, 15 3
Tobacco Inspection Act, 7 U. S. C. §§ 511-511q 19

MISCELLANEOUS: Page

Hough, *Due Process of Law—Today*, 32 Harv. L. Rev. 218 22

Hammell and Seabeck, *Mathematics of Finance*, 13 ... 14

United States Department of Agriculture, Agricultural Marketing Service, *Annual Report on Tobacco Statistics, 1958* (Statistical Bulletin No. 247, March 1959) 33-34 19

Id., *The Auction Marketing of Flue-Cured Tobacco: A Preliminary Appraisal* (Marketing Research Report No. 101, Sept. 1955) 6-7 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No.

B. B. ROGERS, B. S. CORRELL, W. O. NEWELL, *et als.*,
Petitioners,

v.

THE DOUGLAS TOBACCO BOARD OF TRADE, INC.,
a corporation, *et als.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

B. B. ROGERS, B. S. CORRELL, W. O. NEWELL, *et als.*, your petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on May 5, 1959.

OPINIONS BELOW

The opinion of the court below on the first appeal (Appendix A, *infra*, pp. A1-A23) is reported at 244 F. 2d 471. The opinion of the court below on the second appeal,

(Appendix A, *infra*, pp. A24-A38) is reported at 266 F. 2d 636.

JURISDICTION

The judgment of the court below on the second appeal (Appendix B, *infra*, p. A40) was entered on May 5, 1959. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

A tobacco board of trade that controlled a tobacco market had for 36 years allocated selling time on the basis of the comparative warehouse space owned by its members. It is impossible to sell tobacco on that market without an allocation of selling time. Petitioners, new entrants in the market, built a new and larger tobacco auction warehouse which under the existing system of allocation would have been entitled to 36.36% of the available selling time. After completion of petitioners' warehouse, and five days before the start of the next selling season, the board of trade and the warehousemen other than the petitioners, respondents here, adopted a new system of allocating selling time, aimed at petitioners on its face. The new system limited petitioners to only 14.28% of the total selling time, and prohibited increases and decreases in selling time for future years for each warehouse of more than 3 1-2% of that warehouse's allocation for the previous year. As a matter of mathematical calculation, under the 3 1-2% limitation, it would take petitioners over 27 years, under optimum conditions, to attain to the percentage of selling time which would have been theirs under the system which had been in effect when they built their warehouse and for 36 years prior thereto.

The questions presented are:

1. Whether, in the foregoing circumstances, the adoption and operation of the new by-laws amounted, as a matter of law, to an unreasonable restraint of trade in violation of the Sherman Antitrust Act.

2. Whether, assuming a violation of the Act, the limitation of petitioners' selling time constituted a sufficient public injury to sustain an action for treble damages.

STATUTES INVOLVED

The substantive and treble damage provisions of the Sherman Antitrust Act, as amended—§§ 1, 2, and 15; 15 U. S. C. §§ 1, 2, 15—are set out in footnote 1 of the first opinion below, pp. A1-A2, *infra*.

STATEMENT

A. Summary of the Proceedings.

This is an action for treble damages under the Sherman Antitrust Act, brought by petitioners, independent tobacco warehousemen, against The Douglas Tobacco Board of Trade, Inc., and its members, to redress the violations of the Act growing out of the adoption by the respondents of restrictive by-laws, five days before the 1954 selling season began, which changed to the detriment of petitioners the method of allocating selling time that had been in effect for some 36 years previously, and imposed percentage restrictions on increasing petitioners' selling time in later years. A supplemental complaint was filed to cover the 1955 season, after which the District Court granted a motion to dismiss, and, making findings of fact, entered judgment for the respondents.

On appeal, the court below held that the change in the method of allocating selling time (hereinafter called the entry provision) was a reasonable restraint as applied to the year 1954, but that as to the year 1955 "We can see no justification for the limitation on increases and decreases in selling time to 3 1/2 per cent, meaning, as construed and applied, not 3 1/2 per cent of the total available selling time but 3 1/2 per cent of the selling time allotted to the particular warehouse." Accordingly, it reversed the judgment and remanded the case for trial.

for the taking of further evidence "that such limitation tends to prejudice the public interest." Appendix A, *infra*, pp. A1-A23.

With the issues thus limited, the case went to trial on the 1955, 1956, and 1957 selling seasons, the last two seasons having been added by supplemental pleadings.

Following the taking of testimony, the District Court left to the jury four ultimate questions (2R. 600):

> "First, that the three and one-half per cent limit affects interstate or foreign commerce;
>
> "Second, that the three and one-half per cent limit prejudices or tends to prejudice the public interest;
>
> "Three, that the three and one-half per cent limit constitutes an unreasonable restraint of trade; and
>
> "Four, that the plaintiffs have suffered a private injury and been damaged as a direct result of the three and one-half per cent limitation."

These instructions were given on March 6 and 7, 1958, more than a year before this Court's decision in *Klor's v. Broadway-Hale Stores*, 359 U. S. 207.

The jury found for respondents, and petitioners once more appealed. The court below again reversed, primarily because (*infra*, p. A35) "The district court should have instructed the jury that auction sales of tobacco on the Douglas Market are a part of, in, and themselves constitute interstate commerce, and should not have left that question to plague and confuse the jury."

With respect to the substantive questions, as will be explained in greater detail later in the Statement, the court below shifted its position materially on each issue. It said on the one hand (*infra*, p. A36), "The strong language which we used on the former appeal in describing the effect of the 3 1 2 per cent limitation * * * should not be construed as any indication of how the jury should

decide that issue, nor permitted to influence the jury's verdict." It also said (*infra*, p. A38) that its earlier holding as to the reentry provision was limited to 1954, "and was not intended to prevent consideration of the new warehouse provision in determining whether the 31 2 per cent limitation for the years 1955 and those following is an unreasonable restraint on trade."

Since, in petitioners' view, the combination of both the entry and the percentage limitations are shown on this record to be unreasonable restraints as a matter of law, the undisputed facts relating to both will now be set forth.[1]

B. The Douglas Market.

Petitioners and the individual respondents are warehousemen engaged in selling tobacco at auction on the Douglas Tobacco Market in Douglas, Georgia (Cmplt. ¶¶ 2-13, 2R. 17-22; Ans. ¶¶ 6-12, 2R. 47-49).

The auction sales of tobacco on that market are controlled and regulated by the individual respondents through the corporate respondent, The Douglas Tobacco Board of Trade, Inc., hereinafter referred to simply as Board of Trade (Cmplt. ¶ 21, 2R. 25; Ans. ¶ 21, 2R. 50). The membership of the Board of Trade is divided into voting and nonvoting members; all of the individual respondents are voting members, and they hold all of the offices of the Board (Cmplt. ¶¶ 5-12, 2R. 18-22; Ans. ¶¶ 5-12, 2R. 47-49).

The Douglas Tobacco Market is one of twenty-three tobacco auction markets in Georgia, and for some years past it has been either the second or third largest in that State, both in respect of volume and gross value of tobacco sold (Def. Ex. 24, 2R. 159-160, 162-164, 169, 176). It is

[1] The testimony and most of the pleadings appear in the record on the second appeal, No. 17,401, in the court below; this will be referred to as 2R. A few additional matters appear only in the record on the first appeal, No. 16,281 in the same court, which will be cited as 1R.

made up of seven tobacco auction warehouses which, except for petitioners', are operated and controlled by respondents (Cmplt. ¶ 6, 2R. 19; Ans. ¶ 6, 2R. 47-48).

Tobacco is brought by the farmer-growers to the warehouses on the Douglas Market, where it is put into baskets, weighed, placed in rows on the warehouse floors (2R. 223) and is thereafter graded by officials of the United States Department of Agriculture, and sold at auction (2R. 574-575).

About 85% of the tobacco sold on the Douglas Market is then shipped from Georgia to other parts of the United States for processing (2R. 224, 342, 370, 474-475, 580). Tobacco, being perishable, is removed from the warehouse floors on the day of sale or the next day, and transported by truck or rail to redrying plants, only one of which, "a very small one", is situated in Georgia (2R. 475; references just cited; and see also 2R. 471, 577).

C. Allocation of Selling Time.

The maximum amount of tobacco that can be sold on the Douglas Market in any one day is 4400 baskets (2R. 225), an amount fixed as follows: Each tobacco company assigns two buyers to the Douglas Market. One buyer for each company makes up a set of buyers. There are thus two sets of buyers on the Douglas Market. Two sales in different warehouses are conducted simultaneously. Each set of buyers can buy a maximum of 2200 baskets a day, tobacco being auctioned at a fixed rate of 400 baskets per hour during the 5½ hours of the selling day, or 4400 baskets per day in the aggregate. (2R. 225, 318, 494, 561.)

Respondents, through the Board of Trade, divide these 4400 baskets of tobacco among the warehouses on the Douglas Market (2R. 225, 317-318). The Board does this by issuing sales schedules (Pl. Ex. 1, 8, 9, 13; 2R. 88, 106, 116) which assign to each warehouse a certain portion of

the selling day during which sales can be held there. On most selling days, this determines the maximum number of baskets that can be sold each day at that warehouse since the tobacco is auctioned at the fixed rate of 400 baskets per hour. Thus, if one warehouse is allotted 10% of the total selling time, it can sell 440 baskets per day. (Pl. Ex. 6, 9, 2R. 105-106; 2R. 225, 318, 494, 561.)

Selling time is vital to the warehousemen because the buyers, without whom the auction sales cannot be conducted, attend only such sales as are held pursuant to the respondent Board of Trade's sales schedules (Cmplt. ¶ 21, 2R. 25; Ans. ¶ 21, 2R. 50). It is impossible to engage in the tobacco auction warehouse business without selling time (2R. 361), and the profit a warehouseman can make depends on his selling time (2R. 588).

On many days during the selling season, there are on hand more than the 4400 baskets of tobacco that the Douglas Market can sell. When the market is in that condition, it is "blocked", and on blocked days the allocation of selling time determines how much tobacco each warehouse can and will sell. (2R. 225, 302-303, 396, 418, 504, 523.)

On days when the market is not blocked, the farmer can bring his tobacco to any warehouse of his choice (2R. 277). While the "vast majority" (2R. 475) of farmers have a particular warehouse where they want to sell their tobacco (2R. 474-475, 497), on blocked days the farmers must and do "go to any place that they can get in" (2R. 523), viz., to a warehouse with selling time available. In recent years, the Douglas Market has been blocked about two-thirds of the time (2R. 395-396).[2]

[2] The breakdown is as follows:

Tobacco Season	No. of Sales Days	No. of Blocked Days
1955	26	21
1956	22	15
1957	16	7

D. Change in the Board of Trade's By-Laws Consequent Upon Petitioners' Entry Into Business.

"The Douglas Georgia Tobacco Market was established in 1918, and has been in continuous existence for 38 years. Each year, selling time has been allocated to the tobacco warehouses operating there by the Douglas Tobacco Board of Trade. Until the tobacco selling season of 1954 which began July 1954, selling time had been allocated to the warehousemen on the 'Unit Floor Space Basis'. Up to 1954, the usual tobacco warehouse was a building approximately 175 feet wide and 315 feet long * * * for a building with a size of 55,125 square feet, * * * the average sized warehouse contained 55,000 square feet and became known as a 'Unit'. Up to 1954 at the Douglas Market, the selling time was allocated in proportion to floor space or number of units of 55,000 square feet owned by the warehousemen."

"In 1954, B. B. Rogers and his five associates, appellants herein [and now petitioners], came to the Douglas Georgia Market and built an enormous warehouse of 220,000 square feet or four units of 55,000 square feet, all in the same building. * * * On the basis of the 'Unit Floor Space', Rogers, *et al.*, expected to receive 36.36% of the entire selling time * * *." Brief of Appellees, The Douglas Tobacco Board of Trade, Inc., *et al.*, in No. 16,284, C. A. 5, p. 8.[3]

[3] This was the present respondents' brief on the first appeal to the court below, which was served on January 8, 1957. The admissions therein just quoted are in substantial accord with the findings of fact made at the first trial (Fdgs. 7 and 8, 1R. 102-103) and the statements in the opinion of the court below on the first appeal (*infra*, pp. A6-A10).

Before petitioners built their warehouse, there were six warehouses comprising seven units (Fdg. 7, 1R. 102); one of the six warehouses was twice as large as the other five (Fdg. 8, 1R. 103). Also, one set of respondents operated two of the smaller warehouses, thus giving them the benefit of two units (Cmplt. ¶ 10, 2R. 21; Ans. ¶ 10

Petitioners' warehouse, known as Big Independent 1, 2, 3, 4, the largest in the Douglas Market, was completed in June 1954 (Cmplt. ¶ 27, 2R. 28-29; Ans. ¶ 27, 2R. 51). The 1954 selling season of that market opened on July 15, 1954 (Cmplt. ¶ 28, 2R. 29; Ans. ¶ 28, 2R. 52).

In the interim, on July 1, 1954, respondent The Douglas Tobacco Board of Trade, Inc., was incorporated, and acquired all the assets and assumed all the liabilities of the former unincorporated Douglas Tobacco Board of Trade (Cmplt. ¶ 3, 2R. 18; Ans. ¶ 3, 2R. 47; Pl. Ex. 21, 2R. 133 [not printed]).

On July 10, 1954, five days before the 1954 selling season opened, respondents at a meeting of the new corporate Board of Trade adopted a By-Law that instituted, in place of the long established Unit Floor Space System, an entirely new method of allocating selling time (Cmplt. ¶ 29, 2R. 29-31; Ans. ¶ 29, 2R. 52; Pl. Ex. 3, 2R. 90-92).

The new system provided that selling time for the 1954 season would be allocated to warehouses with prior selling experience—*i. e.*, all except that owned by petitioners—in the proportion that the total sales of each bore to the total sales on the market for the last two years.

With respect to new warehouses, the new system provided that if such new warehouse were smaller in size than the average of the others in the Douglas Market, it would receive selling time in the proportion that its size bore to the size of all the others, but that if such new warehouse were larger than the average, then it "shall not receive any consideration in selling time for the size in excess of the average of all warehouses and shall in no

2R 49). Accordingly, when petitioners entered the market, there were already two competitors which under the Unit Floor Space System were each allotted 28.55% of the available selling time (Pls. 7-8, 1R. 102-103). Otherwise stated, see Fdg. 7, 1R. 102, each of those competitors operated two units or 110,000 square feet of warehouse space. See also pp. A6-A7, *infra*.

event be allocated more than its equal pro-rata share as it is determined by the number of warehouses operating as hereinbefore set forth" (2R. 91-92).

The new system further provided that for subsequent tobacco seasons the allotted selling time was not to vary more than 3 1/2% from that allotted in the preceding season.

The new By-Laws (Pl. Ex. 3, 2R. 90-92) are set forth in pertinent part in the first opinion of the court below, *infra*, pp. A7-A10.

E. Effect of the New System on Petitioners' Business.

Although the opinion below on the first appeal deals only with the effect of the new system in 1954 and 1955, the 1956 and 1957 seasons being considered pursuant to supplemental pleadings (2R. 76-85), petitioners believe that it will be more convenient if the consequences of the new system for all four years are first set forth, before the two opinions of the court below thereon are stated.

1. The 1954 Tobacco Market Season.

At the time the 1954 season opened, there was a total of 605,000 square feet of floor space available in the Douglas Market, and under the Unit Floor Space System that had been in effect for the preceding 36 years, there were 11 units of selling time available. Under that System, petitioners' Big Independent with its 220,000 square feet of floor space would have received 4 units, or approximately 36.36%, of the available selling time (Exs. 7-8, 1R. 102-103), which meant that petitioners would have received sufficient selling time to sell 1600 baskets of tobacco each day during the season (4400 × .3636 = 1600).

Under the allocation made by respondents pursuant to the new system, petitioners' Big Independent, as a warehouse "larger in size than the average of all warehouses"

(2R. 91); was counted as one warehouse, and, there being seven on the Douglas Market, petitioners were allocated one-seventh or 14.28% of the available selling time (Fdgs. 940, 1R. 103). This limited petitioners to the sale of 628 baskets of tobacco a day during the 1954 season, although, as they alleged, the farmer-growers brought more than that number of baskets to the Big Independent (Cmplt. ¶ 33; 2R. 36).

2. The 1955 Tobacco Market Season.

The 1955 tobacco market season opened on July 21, 1955 (Pl. Ex. 8, 2R. 106) with the same 4400 basket limitation on the total amount of tobacco that could be sold on the Douglas Market in any one day (2R. 225).

For the 1955 season, petitioners' allocation of selling time was increased from 14.27% to 14.77% of the available selling time, or from 628 to 650 baskets of tobacco per day (Pl. Ex. 2, 8, 2R. 89, 106). Respondents arrived at this allocation as follows:

In 1954, the farmers had patronized the Big Independent in such numbers that petitioners, with only 14.28% of the available selling time, actually sold 19.31% of the tobacco traded on the Douglas Market (Pl. Ex. 2, 2R. 89). On the basis of that performance, petitioners under the substantive performance provision of the new By-Laws would have received enough time to sell 850 baskets a day (4400 × 19.31%). But by reason of the 3 1/2% limitation, petitioners were allowed only enough time to sell 650 baskets, computed as follows (2R. 513-515; Pl. Ex. 2, 2R. 89):

	Sales Time	Baskets
Petitioners' 1954 allocation	14.28%	628
Maximum Permitted Increase (3 1/2% of prior year)	.49%	22
Petitioners' 1955 allocation	14.77%	650

The 3 1/2% limitation was applied in like manner to all of the other warehouses, with decreases similarly limited to 3 1/2%, making the 1955 allocations of selling time for the others substantially the same as for 1954 (Pl. Ex. 2, 2R. 89; 2 R. 365-366, 493, 587-588).

During the 1955 season, the market was blocked for 21 out of 26 market days (2R. 395). Except for the 5 unblocked days, the flow of tobacco on the Douglas Market was therefore predetermined and directed by the selling time allocation under the 3 1/2% limitation (2R. 234-235, 384-385, 418, 475-476, 504, 523).

3. The 1956 Tobacco Market Season.

The 1956 tobacco market season opened on July 25, 1956 (Pl. Ex. 9, 2R. 106).

In 1955, the farmers had again patronized the Big Independent in such numbers that petitioners, with only 14.77% of the available selling time, actually sold 15.88% of the tobacco traded on the Douglas Market (Pl. Ex. 6, 2R. 105).

On the basis of that performance, petitioners under the substantive performance provisions of the new By-Laws would have received sufficient time to sell 699 baskets a day (4400 × 15.88%), or an increase of 49 baskets a day over their 1955 allocation (Pl. Ex. 8, 2R. 106).

However, by application of the 3 1/2% limitation petitioners would have been allowed only time to sell 673 baskets, or an increase of 23 per day (650 × 3 1/2% = 23).

But the 3 1/2% limitation of the By-Laws was not followed in actual allocation. Instead of taking the previous percentage of selling time, 14.77%, and applying the 3 1/2% to that, respondents took only the difference between petitioners' 1955 performance of 15.88% and their 1955 allocation of 14.77%—1.114%—and then applied that much smaller percentage to the 1955 allocation. This came

to an increase of only .165% of selling time, i. e., a single minute, or sufficient time to sell 7 additional baskets. (Pl. Ex. 6, 8, 9, 2R. 105, 106.)

The foregoing paragraph is substantiated by the cited exhibits as well as by the admissions (2R. 405-409) of the respondent Loftis, who at all time here material was Secretary-Treasurer of the Board of Trade and as Sales Supervisor of the Douglas Market computed the allocations of selling time (2R. 492, 508).

On 15 of the 22 selling days of the 1956 season, the Douglas Market was blocked (2R. 396), so that there were only 7 days during the 1956 season when the flow of tobacco to that market was not predetermined and directed by the selling time limitation (2R. 234-235, 523). Thus the status quo on the Douglas Market was maintained (2R. 493; Pl. Ex. 6, 8, 9, 2R. 105-106).

4. The 1957 Tobacco Market Season.

The 1957 tobacco market season opened on July 18, 1957 (Pl. Ex. 19, 2R. 125).

In 1956, the farmers had again patronized the Big Independent in such numbers that petitioners, with only 14.93% of the selling time—14.77%, the 1955 allocation, plus the .165% increase allowed in 1956—sold 16.149% of the tobacco traded on the Douglas Market (Pl. Ex. 12, 2R. 115). On the basis of that performance, petitioners should have received sufficient time to sell 711 baskets a day (4400 × 16.149%) or an increase of 54 baskets per day over 1956.

However, by application of the 3 1/2% limitation, petitioners would have been allowed only time to sell 670 baskets, or an increase of 23 per day (657 × 3 1/2% = 22.99).

But under the allocation actually made by respondents, i. e., applying only the difference between petitioners' 1956 performance of 16.149% and their 1956 allocation of 14.93%

—a mere 1.219%—to the 1956 allocation, the increase of selling time granted petitioners came to .18% of available selling time, or an increase of only 8 baskets a day (Pl. Ex. 12, 13, 16; 2R. 115-116, 124).

On 7 out of the 16 selling days of the 1957 season, the Douglas Market was blocked (2R. 396). This meant that on each of those days the flow of tobacco to the Douglas Market was controlled and directed by the selling time limitations imposed by respondents, again maintaining the status quo (2R. 235-236, 493, 523).

5. Effect of the 3½% Limitation.

Even if the 3 1/2% limitation were followed according to its terms, which, as shown above, was not the case in 1956 and 1957, it is a matter of mathematical demonstration that under this limitation it would take petitioners not less than 27 years and three months to reach the 36.36% of selling time that would have been theirs under the Unit Floor Space System in use at the Douglas Market from 1948 to 1954.

On the assumption that petitioners are able each year to obtain the maximum increase of 3 1/2% of their prior year's allocation, the number of years that it would take them to reach 36.36% of the available selling time is a matter of computation under the "fundamental formula of compound interest" (Hummell and Seabeck, *Mathematics of Finance* (1948) 13), which is as follows:

$$S = P\ (1 + i)^n$$

where

S is amount of selling time due at a later date.
P is original amount of selling time.
i is increase for each period.
n is the number of periods involved.

Applying this formula:

$$S = P\ (1 + i)^n$$

$$36.36\% = 14.28\% \times (1 + 3\tfrac{1}{2}\%)^n$$

$$\frac{36.36\%}{14.28\%} = (1.035)^n$$

$$2.546 = (1.035)^n$$

$$\log 2.546 = n \times \log 1.035$$

$$\frac{\log 2.546}{\log 1.035} = n$$

$$\frac{0.4058}{0.0149} = n$$

$$n = 27.23 \text{ years}$$

Otherwise stated—and of course mathematical computations are well within the realm of judicial notice[4]—it would take petitioners 27 years and 3 months while subject to the 3½% limitation to reach the position that would have been theirs under the pre-1954 system.

Under the system actually applied by respondents in 1956 and 1957 (*supra*, pp. 12-14), no exact computation is possible, but then the period would of course be very much longer than 27 years.

F. The Rulings Below.

As has been indicated, the District Court dismissed the complaint, holding that the By-Laws adopted in 1954 were reasonable and hence lawful (Conc. 1-3, 1R. 165-166), and that no cause of action for treble damages was stated because "there has been no showing of injury to farmers, purchasers, consumers or any other member of the public"

[4] See, e.g., *Brown* v. *Piper*, 91 U. S. 37, 42 ("things which must happen according to the laws of nature"; "matters of science"); *City of Lincoln* v. *Power*, 151 U. S. 436, 441 (mortality tables); *Texas & P. R. Co.* v. *Pottorff*, 291 U. S. 245, 254 (banking practices).

and because "facts could not be pleaded which would change plaintiffs' cause of action from an alleged private wrong to one of public injury" (Conc. 4, R. 106-107).

On the first appeal, the court below held (*infra*, p. A19) "it was not unreasonable for the Board of Trade to conclude that the allotment to the newcomer of more than one-third of the total available selling time was inequitable, and instead to allot to it one-seventh of such time, leaving six-sevenths thereof for apportionment among the six other warehouses in accordance with their performances during the preceding year", adding in a footnote, "There was already a surplus of warehouse floor space on the Douglas Market and we think that the newcomer was entitled to no special consideration because of the unusual size of his warehouse." On this phase of the case, the court below relied primarily on *Chicago Board of Trade* v. *United States*, 246 U. S. 231; *Federal Communications Comm.* v. *RCA Communications*, 346 U. S. 86; and *Day* v. *Asheville Tobacco Board of Trade*, 242 N. C. 136, 87 S. E. 2d 18.

As to the percentage limitation, however, the court below took a different view. It said (*infra*, pp. A20-A21, A22), "We can see no justification for the limitation on increases and decreases in selling time to 3 1/2 per cent, meaning, as construed and applied, not 3 1/2 per cent of the total available selling time but 3 1/2 per cent of the selling time allotted to the particular warehouse. . . .

"The 3 1/2 per cent limitation, we think, practically froze the seven warehouses in their 1954 competitive positions, eliminated in major part the hope of gain and the risk of failure inherent in a true performance system, and, if further evidence which may be taken upon remand shows that such limitation tends to prejudice the public interest [citing *Hudson Sales Corp.* v. *Waldrip*, 211 F. 2d 268, 272 (C.A. 5); *Kinnear-Weed Corp.* v. *Humble Oil & Refining Co.*, 214 F. 2d 891, 894 (C.A. 5); and *Shotkin* v.

General Electric Co., 171 F. 2d 236, 238 (C.A. 10)], it may constitute an undue and unreasonable restraint of trade and commerce."

The judgment was accordingly reversed, and the case remanded for further proceedings (*infra*, pp. A23, A40).

At the outset of the second trial, after the remand, petitioners asked for leave to introduce evidence as to the reasonableness of the entry provision adopted by the respondents in 1954, but the District Court ruled that the first opinion of the Court of Appeals had become the law of the case, and limited the substantive issue to the effect of the 3 1/2% limitation (2R. 206-210). The trial then proceeded under that limitation.

As has been indicated, the District Judge left the question of interstate commerce *vel non* to be determined by the jury, along with three other questions, all of which have already been quoted above, p. 4.

The jury returned a verdict for the respondents, and petitioners once more appealed.

On the second appeal, the court below held at some length, (*infra*, pp. A25-A35) that the district court "should have instructed the jury that auction sales of tobacco on the Douglas Market are a part of, in, and themselves constitute, interstate commerce, and should not have left that question to plague and confuse the jury * * * because, as a matter of law, the auction sales of tobacco are *in* interstate commerce."

On each of the other three points considered by it on the first appeal, the court below changed its earlier position.

1. Apparently under the spell of some of the Fourth Circuit's expressions in *Asheville Tobacco Board of Trade, Inc.* v. *F.T.C.*, 263 F. 2d 502, it modified its former condemnation of the 3 1/2% limitation, saying (*infra*,

pp. A36-A37), "The strong language which we used on the former appeal in describing the effect of the 3 1 2 per cent limitation * * * should not be construed as any indication of how the jury should decide that issue, nor permitted to influence the jury's verdict. * * * The testimony in the present case tends to sustain the Fourth Circuit's view that some limitation on the percentage of gain or loss in any one year is reasonable, and, we think, that question, together with the reasonableness of the particular 3 1 2 per cent limit, as construed and applied by the defendants, must be left to the jury under proper instructions."

2. With respect to the entry provision, the court below, again citing the Fourth Circuit's *Asheville* decision, said (*infra*, p. A38) that "Our holding was, however, limited to the first year, 1954, and was not intended to prevent consideration of the new warehouse provision in determining whether the 3 1 2 per cent limitation for the years 1955 and those following is an unreasonable restraint on trade. For example, that 3 1 2 per cent limitation might be unreasonable if combined with the new warehouse provision, it would operate to unduly discourage desirable building operations."

3. As to the requirement of public injury, the court below, after citing *Klor's* v. *Broadway-Hale Stores*, 359 U. S. 207, said (*infra*, p. A37): "In restraints, like the present one to which 'the rule of reason' applies, while the jury should not, and cannot properly, reject the policy of the Sherman Act which has been determined by Congress, it must still decide whether the particular conduct is reasonably calculated to prejudice the public interest which that Act is designed to protect. * * * That does not mean that specific public injury must be proved before a private person can recover; but before it can be said that the conduct is forbidden as *unreasonably* restraining trade or commerce within the meaning of the Sherman

Anti-Trust Act it must appear that it *tends* or is *reasonably calculated* to prejudice the public interest.'"

This second time also, the judgment was reversed and the cause remanded (*infra*, pp. A38, A40).

REASONS FOR GRANTING THE WRIT

The public interest in the free flow of tobacco in interstate commerce joins with the injury suffered by these petitioners in seeking from this Court clarification, stabilization, and—above all—correction of the Fifth Circuit's twice-repeated failure to deal with the flagrant and indeed crass restraint of trade perpetrated and persisted in by the respondent Board of Trade and its members that is so plainly proved upon the present record.

First. The Douglas Market is one of some 95 auction markets for the sale of flue-cured tobacco in the United States[5] on all of which the allocation of selling time is made by the local tobacco board of trade,[6] i. e., by the warehousemen in each market. The actual mechanics of the sales of such tobacco have been several times described by this Court (*Townsend* v. *Yeomans*, 301 U. S. 441, 443-446; *Currin* v. *Wallace*, 306 U. S. 1, 7-8; *American Tobacco Co.* v. *United States*, 328 U. S. 781, 798-804), and these sales are among those that have been subject to federal regulation since 1935 pursuant to the Tobacco Inspection Act, now 7 U. S. C. §§ 511-511q. The outcome of the present litigation is therefore obviously of concern to many more persons than the parties alone.

---

[5] U. S. Department of Agriculture, Agricultural Marketing Service, *Annual Report on Tobacco Statistics, 1958* (Statistical Bulletin No. 247, March 1959) 33-34.

[6] U. S. Department of Agriculture, Agricultural Marketing Service, *The Auction Marketing of Flue-Cured Tobacco: A Preliminary Appraisal* (Marketing Research Report No. 101, Sept. 1955) 6-7.

Second. Petitioners have been twice before a district court, and have twice appealed, with partial success, to the court below. Their unwillingness to seek review of that court's first judgment plainly does not narrow the scope of the issues now open (*United States* v. *United States Smelting Co.*, 339 U. S. 186, 198-199), and indeed resulted in establishing more fully not only the nature of respondents' practices but also the effect of those practices over a longer period. They submit, therefore, that they should not be subjected to the expense and inconvenience of another trial plus, it may well be, a third appeal. Considerations of sound judicial administration require the questions presented to be resolved now, *Southwestern Sugar* v. *River Term.*, 360 U. S. 411, 415-416, particularly since the court below has shifted its position on each appeal on no less than three points.

1. On the first appeal, the court below held reasonable as a matter of law the entry provision, under which, by a change effected five days before commencement of the market season in the system of allocating selling time that had been in force for 36 years, petitioners were reduced from 36.36% of the available selling time, which would have been theirs under the old system, to only 14.28% under the new (Appendix A, *infra*, pp. A6-A20). At the retrial, the district court, applying "the law of the case" (2R. 206-210), excluded all evidence as to the effect of the reentry provision. On the second appeal, the court below directed consideration of the entry provisions for the later years, on the view that (Appendix A, *infra*, p. A38) "that 3 1/2 per cent limitation might be unreasonable if, combined with the new warehouse provision, it would operate to unduly discourage desirable building operations."

2. On the first appeal, the court below denounced the 3 1/2% freeze limitation in ringing terms (*infra*, pp. A20-

A21): "We can see no justification for the limitation on increases and decreases in selling time to 3 1/2 per cent, meaning, as construed and applied, not 3 1/2 per cent of the total available selling time but 3 1/2 per cent of the selling time allotted to the particular warehouse." But on the second appeal, the court below backtracked perceptibly, saying (*infra*, p. A36), "The strong language which we used on the former appeal in describing the effect of the 3 1/2 per cent limitation should not be construed as any indication of how the jury should decide that issue, nor permitted to influence the jury's verdict."

3. On the first appeal, the court below dealt with the "public interest" concept by saying (*infra*, p. A22) that "if further evidence which may be taken upon remand shows that such [3 1/2%] limitation tends to prejudice the public interest [citing two of its own prior decisions], it may constitute an undue and unreasonable restraint of trade and commerce." On the second appeal, decided after *Klor's* v. *Broadway-Hale Stores*, 359 U. S. 207, the court below said (*infra*, p. A37), "In restraints, like the present one to which 'the rule of reason' applies, while the jury should not, and cannot properly, reject the policy of the Sherman Act which has been determined by Congress, it must still decide whether the particular conduct is reasonably calculated to prejudice the public interest which that Act is designed to protect. * * * That does not mean that specific public injury must be proved before a private person can recover; but before it can be said that the conduct is forbidden as *unreasonably* restraining trade or commerce within the meaning of the Sherman Anti-Trust Act it must appear that it *tends* or *is reasonably calculated* to prejudice the public interest." [Italics in original.]

Third. Finally, the rulings below fail in numerous respects to give effect to controlling decisions here as to the scope and purpose of the Sherman Act.

I. Inasmuch as it is illegal for a group of competitors to exclude a new entrant altogether (*Associated Press v. United States*, 326 U. S. 1), a rule that has already been applied to a tobacco market, see *American Federation of Tobacco Growers v. Neal*, 183 F. 2d 869 (C. A. 4), respondents could not have denied petitioners any allocation of selling time whatever. Could they then limit petitioners by a change in the established method of making such allocations, a change effected after completion of petitioners' warehouse and five days before the new selling season opened?

When entry into a tobacco market is permitted on a fair basis, a new rule is not necessarily bad simply for being new. See *In the Matter of Wilson Tobacco Board of Trade, Inc.*, F. T. C. Docket No. 6262, Aug. 23, 1956. But here, wholly unlike the situation considered in the *Wilson* case, the entry provision denied petitioners all floor space credit "for the size in excess of the average of all warehouses" (*supra*, p. 9). Theirs being the only warehouse in that category, this was in the nature of a "sandbag"[7] directed against them alone. Cf. *McFarland v. American Sugar Ref. Co.*, 241 U. S. 79. And, inasmuch as it reduced their allotment by more than 60%, it surely was not automatically reasonable, as the court below held (*infra*, pp. A13-A14), under the rule of *Chicago Board of Trade v. United States*, 246 U. S. 231, simply because it did not involve price-fixing. Price-fixing is not the only restraint which is unreasonable *per se*, it is similarly unreasonable *per se* to foreclose competitors from any substantial market. E. g., *Fashion Originators Guild v. Federal Trade Comm.*, 312 U. S. 457; *International Salt Co. v. United States*, 332 U. S. 392. And it is surely a disservice to the memory of the author of the *Chicago Board of Trade* opinion to analogize the regulation there

[7] The expression is Judge Hough's. See his *Due Process of Law—To-Day*, 32 Harv. L. Rev. 218, 233.

involved with the entry provision here, or to suggest that the cure for The Curse of Bigness is to be found in a beatification of the status quo effected through the lessening and indeed the petrification of competition.

But the entry provision cannot be considered in isolation. Whatever might have been the situation had the entry provision's shift in petitioners' selling time from 36.36% down to 14.28% been followed by a true performance system thereafter, here the entry provision was combined with a percentage limitation under which, as a matter of mathematics, petitioners under optimum conditions could not have worked their way back to 36.36% until more than 27 years had elapsed (*supra*, pp. 14-15). That indisputable circumstance brings into play the rule that "however innocent such agreements might be, standing alone, they would assume quite a different aspect if utilized as essential features of a program to hamper or destroy competition." *Associated Press* v. *United States*, 326 U. S. 1, 14.

Here the entry provision and the 31 2% limitation were integral features of a plan that plainly hampered competition by freezing the status quo. Respondents' "intent" is therefore immaterial; all that counts is the restraint that resulted from their acts. *United States* v. *Griffith*, 334 U. S. 100, 105. The court below was therefore plainly in error in excluding the entry provision from consideration at the outset, and in permitting it, on the second appeal (*infra*, p. A38) to be considered only as to subsequent years, and then solely for the purpose of determining the reasonableness of the 31 2% limitation.

2. The 31 2% limitation on future increases or decreases was, we submit, properly condemned on the first appeal, and improperly lifted into the realm of arguable

The reference in the first opinion (*infra*, p. A16) to "unneeded warehouse space" does not reflect any facts in the present record.

reasonableness on the second. It should be noted that this limitation was not a percentage of the entire market, but only a percentage of each warehousemen's sales for the prior season. All too plainly, that provision on its face destroyed the incentive to competition inherent in an untrammelled performance system, because it penalized the efficient warehousemen who attracted the farmers' business, and shielded the less efficient from the consequences of their inability to attract customers in a free market. This record plainly establishes that, in each season following their entry into the market, petitioners were allotted substantially less selling time than they had earned as a matter of their performance in the previous season (*supra*, pp. 11-14).

We are not here concerned with the reasonableness of 3 1/2% as an abstract percentage. An interest rate of 3 1/2% would be reasonable anywhere. A margin of error of 3 1/2% might or might not be reasonable depending on the activity concerned; on college examinations it would mean a high A, while in any article machined on a lathe it would result in junk for the scrap heap. This case does not concern abstractions, or interest rates, or examination marks or manufacture; it concerns commerce, which—it cannot be too often repeated—"is not a technical legal conception, but a practical one, drawn from the course of business." *Swift & Co.* v. *United States*, 196 U. S. 375, 398. Here the course of business shows, first, that with the 3 1/2% limitation of the new by-laws in effect, it would as a matter of calculation take petitioners over 27 years to earn the selling time that would have been theirs under the system in force when they built their warehouse (and in force for 36 years before that); and, second, that respondents so manipulated even that limitation that petitioners' selling time thereafter was virtually frozen. After all, the increases of .165% and .18% in selling time for 1956 and 1957 (*supra*, pp. 12-14) —increases of 7 and 8 baskets a day—were *de minimis*

Respondents had so solidified the allocation of selling time that competition was completely stifled.

Such a restraint—and it is proved by documents and by the testimonial admissions of the respondent Loftis, Sales Supervisor of the Douglas Market—such a restraint, we submit, is unreasonable as a matter of law. The basic facts are not and cannot be disputed, and indeed the present proceeding has advanced far beyond the pleadings and summary judgment stages that were held adequate in, respectively, *International Salt Co.* v. *United States*, 332 U. S. 392, and *Associated Press* v. *United States*, 326 U. S. 1. No jury would be permitted to grant to its neighbors dispensation from the commands of the Sherman Act in respect of the flagrant paralyzing of competition that this record so plainly reveals. The only question open is the extent to which petitioners have been damaged, but that issue, equally plainly, cannot be resolved until this Court has clarified the misconceptions that becloud both the opinions already rendered below.

3. Such clarification is particularly called for in respect of the concept of "public interest" as that concept has been heretofore applied in the present litigation. Originally, the district court held (1R. 106-107) that "Since the complaint does not allege, and there has been no showing of, injury to farmers, purchasers, consumers or any other member of the public, no cause of action has been stated under the anti-trust laws", citing cases,[2] and adding that "it is clear from the record that facts could not be pleaded which would change plaintiffs' cause of action from an alleged private wrong to one of public injury." The court below on the first opinion, citing some

[2] *Kinnear-Weed Corp.* v. *Humble Oil & Refining Co.*, 214 F. 2d 891 (C.A. 5); *Shotkin* v. *General Electric Co.*, 171 F. 2d 236, 239 (C.A. 10); *Bradley* v. *Hudson Motor Car Co.*, 82 F. Supp. 8, 11 (W.D. Ky.); *Interborough News Co.* v. *Curtis Publishing Co.*, 127 F. Supp. 286, 301 (S.D.N.Y.).

of the same cases,[10] appeared to espouse their holdings, insofar as applicable, in substance to the effect that injury to a single plaintiff was an insufficient basis for injunctive relief and treble damages.

Thereafter, *Klor's* v. *Broadway-Hale Stores*, 359 U. S. 207, cleared the atmosphere by reaffirming the doctrine that, once a violation of the Sherman Act is established, the public wrong inheres in that violation, and it is no defense that the violation injures only a single victim.

It is not at all clear that the court below in its equivocal expressions on the second appeal has fully given effect to the thrust of the *Klor's* holding. See the passage already twice quoted, *supra*, pp. 18-19, 21.

While, as before indicated, we believe that the restraints exposed on this record are unreasonable *per se* and too plain and glaring to present a question of fact for a jury, we deem it important that this Court strip off the verbal barnacles that have too long impeded the proper determination of so many Sherman Act cases. Any unreasonable restraint of competition is a violation of that Act. Therefore, in our view, any such unreasonable restraint constitutes a public injury, since the public is always injured whenever a public law is violated. Only by concentrating on the reasonableness or otherwise of a particular restraint, and by avoiding unhelpful talk about the public interest, talk that inevitably tends to an erroneous concentration on the paucity of victims, will it be possible to eliminate this error, an error that infected the trial judge's reasoning here (1R. 106-107, quoted, *supra*, p. 25), that also does not appear to be wholly absent from the latest views of the court below in this case, and that required reversal by this Court in *Klor's*.

---

[10] *Kinnear-Weed Corp.* v. *Humble Oil & Refining Co.* and *Shatkin* v. *General Electric Co.*, both *supra* note 9; *Hudson Sales Corp.* v. *Waldrip*, 211 F. 2d 268, 272 (C. A. 5).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

NORMAN M. LITTELL,
1826 Jefferson Place, N. W.,
Washington 6, D. C.,
Counsel for the Petitioners.

FREDERICK BERNAYS WIENER,
1025 Connecticut Avenue, N. W.,
Washington 6, D. C.,

CHARLES J. ALEXANDER,
1826 Jefferson Place, N. W.,
Washington 6, D. C.,

JOHN G. KOPP,
J. EDWIN PEAVY,
408-410 Bunn Building,
Waycross, Georgia,
Of Counsel.

JULY 1959.

APPENDIX A

OPINIONS BELOW.

1. First Opinion, 244 F. 2d 471.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16284

B. B. ROGERS, ET AL., *Appellants*,

versus

THE DOUGLAS TOBACCO BOARD OF TRADE, INC., ET AL., *Appellees*.

CHARLES B. HOLCOMB, ADMINISTRATOR, and VIRGINIA H. GAMBILL, ADMINISTRATRIX, of the estate of Rady E. Holcomb, deceased, *Appellants*,

versus

B. B. ROGERS, ET AL., *Appellees*.

Appeals from the United States District Court for the Southern District of Georgia

(May 9, 1957)

Before HUTCHESON, Chief Judge, and RIVES and BROWN, Circuit Judges.

RIVES, Circuit Judge: In an action for treble damages for alleged violations of the Sherman Anti-Trust Act,[1]

[1] 15 U.S.C.A. §§ 1, et seq. In pertinent part §§ 1, 2, and 15 of said Act provide as follows:

"§ 1. *Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty*

"Every contract, combination in the form of trust or otherwise,

the district court sustained the motions of the defendants to dismiss and for judgment on the pleadings, and this appeal ensued.

The basic facts as established by the pleadings, admissions and affidavits are substantially without dispute. We shall therefore heed Judge Sibley's wise admonition, and go directly to the facts.

Beyond the control of the defendants, according to the present record, are many of the facts and circumstances from which it is claimed that the necessity arose for the

---

or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal * * *. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

"§ 2. *Monopolizing trade a misdemeanor; penalty*

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

"§ 15. *Suits by persons injured; amount of recovery*

"Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

"Under the Rules of Civil Procedure a case consists not of the pleadings, but the evidence, for which the pleadings furnish the basis. Cases are generally to be tried on the proofs rather than the pleadings." De Loach v. Crowley's, Inc., 5th Cir., 153 F. 2d 378, 380.

allocation of selling time among tobacco warehouses in each of the local markets in the flue-cured area.[3]

[3] Clearly and succinctly stated in the affidavit of Fred S. Royster, President of the Bright Belt Warehouse Association, Inc.:

"It is necessary to allocate selling time among warehouses on each local market for the following reasons:

"Tobacco is a perishable commodity. It must be heat treated, referred to in the trade as redrying, within a short period of time after purchase and removal from the warehouse floors. The aggregate facilities of the tobacco buying companies and dealers for the redrying of producers' tobacco in the flue-cured area have a maximum capacity of about 120,000,000 pounds weekly. The limit of this capacity is such that the volume of tobacco sold at auction in any one week must be regulated in order to prevent tobacco from deteriorating before it can be processed.

"Regulation of the flow of tobacco from producer to manufacturer on an over-all basis within the flue-cured area is accomplished in the following manner:

"The flue-cured area is divided into 'belts.' In each belt there is in existence a Tobacco Warehouse Association operating in that belt, which is composed of all or most of the various warehouses. Membership by the individual warehouses is voluntary. Each of the five belt associations elect six of their members to serve on the Board of Governors of an organization known as the Bright Belt Warehouse Association. The Board of Governors of the Bright Belt Warehouse Association represent the vast majority of the entire tobacco warehouse industry in the flue-cured area comprising Virginia, North Carolina, South Carolina, Georgia, and Florida and, through a 'sales committee', performs the following functions:

"1. The Board of Governors sets the date for the opening of the tobacco auction markets in each of the five belts, beginning with the extreme southern belt and moving northward through the five belts. The markets in the Georgia-Florida belt open around July 15 to July 25 and operate for approximately four or five weeks. The South Carolina and Border Belt opens approximately one week to two weeks after the Georgia Florida Belt and remains open approximately seven weeks. The Eastern North Carolina Belt opens approximately two weeks after the opening of the South Carolina Border Belt. The Middle Belt opens one or two weeks after

opening of the Eastern North Carolina Belt. The old Belt follows, opening about two weeks after the Middle Belt.

"(2) The Sales Committee determines the number of hours per day during which all tobacco markets in each belt may operate. The maximum hours of operation for any market are 5½ hours since this is the maximum working day for United States Department of Agriculture Graders and is the generally accepted work day throughout the industry. In the event the sales committee finds it necessary to reduce sales hours, the markets are given 48 hours notice.

"The sales committee does not distinguish between markets and allot more hours for sale to one market within the same belt than to another—all are allotted the same.

"(3) The Board of Governors determines the maximum number of baskets of tobacco which may be auctioned per hour per set of buyers. The maximum rate of speed is 400 piles per hour, or about 9 seconds per basket. This is the reasonable maximum speed for conduct of an auction sale and it is generally accepted in the industry as the best speed.

"The effect of the foregoing regulations promulgated by the Bright Belt Warehouse Association is that this association determines and controls the maximum amount of tobacco which may be sold in one day by each market. For example, one market has five sets of buyers. Since each set of buyers, under the regulations, can purchase a maximum of 400 baskets per hour, if the sales day is set at five hours, this means that one set of buyers in that market can purchase five times 400 baskets, or 2,000 baskets. Thus five sets of buyers can purchase five times 2,000, or 10,000 baskets per day. Since the sales committee of the Bright Belt Warehouse Association knows the average weight per basket of tobacco, it can effectively control the total tonnage moving through the markets by simply controlling the rate of sale and the hours of sale per day.

"In the final analysis the precise amount of tobacco which can be sold on any market in any one day is controlled by the number of sets of buyers on the market. The number of sets of buyers assigned to a market is determined exclusively by the buying companies and the Bright Belt Warehouse Association has nothing to do with the assignment of buyers to a market. Thus, if the buying companies choose to send another set of buyers to a particular market, that market would automatically be able to auction more tobacco per day.

"As hereinbefore stated, the maximum combined redrying capacity of the buying companies is approximately 120,000,000

The internal allocation of selling time among the warehouses on any local market is done by the tobacco board of trade of the particular city where the market is located. The defendants, as majority voting members of The Douglas Board of Trade, are responsible for the allocations of selling time among the warehouses on the Douglas, Georgia, tobacco market, and those allocations give rise to the present action.

---

pounds weekly. Thus, the reason that sales on the market must be geared to the overall redrying capacity is because there are redrying facilities on some markets and not on others and there is a cross movement of tobacco between markets for processing. In other words, for example, the American Tobacco Company may purchase tobacco on a particular market and ship it to some other locality for redrying. Of course, the Bright Belt Warehouse Association cannot tell a given buyer where to take his green tobacco for redrying nor on what markets to buy his tobacco.

"The sales committee of the Bright Belt Warehouse Association obtains a daily report from the United States Department of Agriculture of the total pounds sold on all markets on the preceding day and in this way the sales committee does keep a check on tonnage flow of tobacco to see that it does not exceed maximum processing capacity. Also, a particular buying company may notify the sales committee that their purchases have been so heavy that their redrying facilities cannot handle the tobacco and may request a curtailment of sales hours for a period of time. The sales committee, of course, gives serious consideration to such a request because it is to the interest of the farmers and the auction market system as a whole that buyers of a particular company not be withdrawn from the market because of an inability of that company to process its purchase. When in the considered judgment of the sales committee the public interest requires a temporary curtailment of the volume of tobacco flowing through the warehouses to the processing plants because of inability of the plants to redry the tobacco, it takes remedial action by either reducing sales hours or suspension of all sales until processing can catch up.

"The authority of the Bright Belt Warehouse Association derives from the consent of its membership and the farmers and industry generally. There is no statutory authority.

"The Bright Belt Warehouse Association takes no action with respect to the internal allocations of selling time among warehouses on any market."

The Douglas market has been in continuous existence since 1948. At the present time it includes seven tobacco warehouses, one of which is operated and controlled by the plaintiffs, and six by various parties named as defendants. Tobacco is brought by the farmer growers to the warehouses where it is sold at auction by the basket or pile to buyers assigned to the market by the buying companies (see footnote 3, *supra*). Those companies have assigned to the Douglas market two sets of buyers, from which it follows that only two auction sales can be conducted simultaneously, and that the maximum amount of tobacco that can be sold on the Douglas market in any one day of the four or five weeks of the selling season is 4400 baskets. The opportunities of each of the seven tobacco warehouses to sell any part of this 4400 baskets is controlled by the local Board of Trade, which assigns to each of the warehouses a certain portion of each selling day during which sales can be held at that warehouse. The buyers attend only those sales held pursuant to the schedule of selling time issued by the Board. Eligible for membership in the Board of Trade are the tobacco warehousemen, the buyers, and all persons operating on the tobacco market. The defendants comprise the majority of the participating or voting membership of The Douglas Board of Trade and, hence, control and direct the policies and practices of the Board.

For many years prior to the opening of the 1954 tobacco market season, it was the custom and practice of the Douglas Board of Trade to allocate selling time to each of the warehouses on the basis of the "Unit Floor Space System." Each warehouse was credited with one unit for each 55,000 square feet of floor space. Five of the warehouses owned by various defendants were one-unit warehouses, and the sixth was a two-unit warehouse. Thus, prior to the construction of plaintiffs' warehouse, there were a total of seven units, the two-unit warehouse operated and controlled by one set of defendants, two of

the one-unit warehouses by another set of defendants, and each of the three other one-unit warehouses by a separate set of defendants. There being a total of seven units of floor space in the six warehouses, the two-unit warehouse was allotted two-sevenths of the selling time, and each of the other warehouses one-seventh thereof. In May of 1954 the plaintiffs commenced the construction of a four-unit or 220,000 square foot warehouse in Douglas. If the "Unit Floor Space System" of allocation had remained in effect, the plaintiffs, upon completion of their warehouse in time for the opening of the 1954 season on July 15, 1954, would have been entitled to considerably more than one-third of the total selling time available for the Douglas market.

As soon as the defendants learned of the plaintiffs' intention to construct a warehouse and throughout the period of construction differences arose, the defendants accusing the plaintiffs of trying to force them to buy the new warehouse rather than let the plaintiffs "hog" the market, and the plaintiffs accusing the defendants of trying to prevent them from engaging in the tobacco auction business on the Douglas market. The plaintiffs' warehouse commonly known as the Bic Independent 1, 2, 3, and 4, was completed by the end of June, 1954, at a cost of $200,000.00.

On July 10, 1954, about ten days after the completion of plaintiffs' warehouse and five days before the 1954 season opened, The Douglas Board of Trade adopted new by-laws to provide for the allocation of selling time as follows:

"ARTICLE III.

"WAREHOUSEMEN.

"Section 1. Any warehouse desiring membership in the Douglas Tobacco Board of Trade, Inc., and desiring to sell tobacco as a member of said association shall be built within the city limits of Douglas,

Georgia, or within a reasonable distance from said city limits and within Coffee County, Georgia. A tobacco warehouse shall be a building suitable for selling tobacco, with proper lighting, scales, trucks and other necessary fixtures and shall be easily accessible, both to farmers and to buyers.

"Section 2. It is further provided that a warehouse under this provision is any warehouse building under one continuous roof (not connected with any other roof, and over one continuous floor (not connected with any other floor), and provided further that no single warehouse building shall be divided for the purpose of being counted as two or more warehouses. After a warehouse is originally built, no alterations or changes can be made to such warehouse in order to make more than one original house. Any concern operating more than one warehouse may transfer sales from one warehouse to another as they see fit."

"ARTICLE IV.

"Section 1. Until a change of conditions shall warrant a change in these By-Laws, and until there is such a change in these By-Laws, limited selling time available for the several auction warehouses on the Douglas Tobacco Market shall be divided among and allocated to the several warehouses doing business on the Douglas market at Douglas, Georgia, in accordance with the following rules, to-wit:

"A. If all of the warehouses on said market for any given year shall agree unanimously in writing upon the divisions of selling time among these warehouses then such unanimous agreement shall be recognized by the Douglas Tobacco Board of Trade and the selling time shall be allocated among the said warehouses in accordance with said unanimous agreement, which shall be signed by all warehousemen and the

original filed with the secretary of the association and available to all interested parties.

"B. Inasmuch as 1954 season will be the first season after the formation of the Douglas Tobacco Board of Trade, Inc.,[1] the selling time for 1954 shall be allocated to each warehouseman in such proportion as the gross sales of tobacco in such warehouse were to the total gross sales on the Douglas, Georgia, tobacco market for the two years preceding the allocation, provided, however, that after the 1954 season in arriving at gross sales no amount of tobacco sold in resale in excess of 10% of the total sales of gross sales of any warehouse will be considered. That is to say, after the 1954 season the allocation shall be in proportion to sales by each warehouseman to total sales, based on producers sales, plus 10% of resales of tobacco, provided further

"That the said selling time in each warehouse shall not vary more than 3½% from the allocated selling time for the preceding season.

"Provided further, however, that in the event of a new warehouse and or a warehouse which did not operate on the Douglas, Georgia, tobacco market during the preceding season, claiming selling time, then the selling time alloted to such new warehouse or warehouse not operating the preceding season claiming selling time, shall be allotted, on an average and in proportion with the amount of selling time available to all warehouses operating as a part of Douglas, Georgia, tobacco market; provided, further, if such new warehouse and or warehouse which did not operate the preceding season is smaller in size than the average of all warehouses comprising the Doug[illegible]

[1]The Board of Trade had theretofore been an unincorporated association.

Georgia, tobacco market, then the selling time shall be allotted according to the proportion of its size in relation to all other warehouses. Provided further that if said new warehouse or warehouses which did not operate the preceding season is larger in size than the average of all warehouses operating on the Douglas, Georgia, tobacco market, such warehouses or warehouse shall not receive any consideration in selling time for the size in excess of the average of all warehouses and shall in no event be allocated more than its equal pro-rata share of selling time as it is determined by the number of warehouses operating as hereinbefore set forth.

"C. The total remaining selling time allotted to the market after selling time has been allotted to a new warehouse and or a warehouse which did not operate on the market during the preceding season, shall be allotted to the remaining houses which did operate the preceding season in accordance with the first paragraph of sub-section B above."

The parties are agreed that under the "Unit Floor-Space System" theretofore in effect the plaintiffs would have received approximately 36.36 per cent of the available selling time or an opportunity to sell 1600 baskets of tobacco a day during the 1954 market season, while, under the "Modified Experience Basis," adopted by the new by-laws, they were actually allocated one-seventh, 14.28 per cent, of the available selling time, limiting them to the sale of 628 baskets of tobacco a day during the 1954 season. The farmer-growers brought to the plaintiffs' warehouse during the 1954 season more tobacco than could be sold within the allotted selling time.

The 1955 season opened on July 21, 1955, with the same maximum limitation on the total amount of tobacco that could be sold on the market in any one day—4400 baskets

a day. The plaintiffs' allocation of selling time was increased from 14.28 to 14.77 per cent of the available selling time, or from a maximum of 628 to 650 baskets of tobacco a day. If the 3½ percent (3½% of 14.28%) limitation had not been applied and the plaintiffs had been allocated selling time on the basis of their performance during the 1954 season, it is estimated that they would have received an allocation of selling time sufficient to sell 924 instead of 650 baskets of tobacco a day during the 1955 season.

The basic question for decision is whether, under the foregoing facts, the defendants were entitled to a judgment as a matter of law.

Considering first the earlier year, 1954, the defendants insist that some form of allocation of selling time among local tobacco warehouses was necessary and that the change from the "Unit Floor Space System" to the "Modified Experience Basis" was reasonable.

All of the responsible parties are not before the court, and the issues are not so framed as to call for a review of the necessity for some form of allocation of selling time. That necessity arises for the reason set forth in the affidavit of Fred S. Royster (footnote 3, *supra*), for none of which is there any claim that the defendants are responsible. The tobacco buying companies and dealers can preserve and redry only so many pounds of tobacco per week. There is thus a natural limit to the amount of tobacco they can purchase. They choose to make such purchases by open competitive bidding at tobacco auction markets. Their right to make that choice has not been questioned. In all probability the auction method provides each farmer grower with more competition for the purchase of his tobacco than he would otherwise have. The buying companies assign to each market the number of sets of buyers they see fit, and again no one has questioned their right so to do. Certainly none of the defendants can require them to assign a greater number of buyers.

Automatically the number of sets of buyers determines the amount of tobacco which can be sold on any market in any one day. When the buying companies and the Bright Belt Warehouse Association have acted, the total selling time of each local market and the total amount of tobacco which can be sold on such market have become fixed. The tobacco auction market system is thus an organized and restricted rather than an uncontrolled and completely free arrangement. This action is not a frontal attack upon that entire system, but is restricted to one relatively small segment, namely, the internal allocations of selling time on the Douglas market.

Auction tobacco warehouses do much more for the farmer than simply storing and preserving his highly perishable tobacco. One of their chief functions is to obtain the best possible price for his tobacco. At an auction sale the "man in the hole" represents the warehouse, keeps the bidding lively so as to get the highest price possible, and in so doing often has a pile of tobacco "knocked down" or sold to the warehouse itself. A farmer dissatisfied with the last bid has the privilege of rejecting all bids.

With two sets of buyers assigned to the Douglas market, and, hence, only two auction sales being conducted simultaneously, with a maximum working day of 5½ hours, and the market operating for only four or five weeks, and with the possibility of selling only 400 piles of tobacco per hour, it becomes obvious that for the tobacco auction market system to be workable at all, the limited total available selling time must be allocated among the warehouses upon some basis. That necessity has given rise to a custom adhered to generally throughout the flue-cured area by the buyers and by the warehouses alike by which the function of allocating selling time among the local warehouses devolves upon the local board of trade. In North Carolina that custom has been carried forward into a statute formally vesting such authority in the Tobacco Boards of

Trade of the several towns and cities. North Carolina Public Laws, 1933, Chapter 268. Georgia has no similar statute granting specific authority to boards of trade. They have, however, exercised such authority for the past thirty-five years with the consent of all interested parties, so that the custom or usage has become the subject of judicial notice. See 20 Am. Jur., Evidence, Secs. 109 and 110.

Various local boards of trade have developed successively different systems of apportioning selling time among warehouses. Examples of such systems are "wall-to-wall", or the sale of all available tobacco in each warehouse before proceeding to the next; the "unit" system, under which each warehouse is counted as one unit; "floor space", or the allocation of the total available selling time among the warehouses in proportion to their square foot area; and the "performance" system, under which selling time is allocated to each warehouse on the basis of its individual last year's performance.

Up to the time of plaintiffs' advent upon the Douglas market, the operators of the six other warehouses had been able to reach unanimous agreement upon the amount of selling time to be allotted to each warehouse. Plaintiffs' appearance on the scene resulted in the adoption by the Board of Trade of the new by-law with which we are here concerned, and the effect of which, broadly speaking, was to switch from the "floor space" system to the "performance" system.

This case does not involve any plan of market price-fixing either directly or indirectly. There is, therefore, no conclusive pre-sumption of illegality.[3] The guiding prin-

[3] Compare United States v. Trenton Potteries Co., 273 U.S. 392; Dr. Miles Co. v. John D. Parks & Sons Co., 220 U.S. 373; F.T.C. v. Beech-Nut Packing Co., 257 U.S. 441; United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150; United States v. Griffith, 334 U.S. 100.

ciple in this case is that stated in *Chicago Board of Trade* v. *United States*, 246 U.S. 234, 238:

> "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences."

See, also, *United States* v. *Tarpon Springs Sponge Exchange*, 5th Cir., 142 F. 2d 125, 128.

The Sherman Act does not erect any standards for the positive conduct of trade and commerce, it is prohibitory legislation. Men may conduct their businesses as they see fit so long as they do not tend to restrain trade or commerce. As recently expressed by the Supreme Court:

> "That there is a national policy favoring competition cannot be maintained today without careful qualification. It is only in a blunt, undiscriminating sense that we speak of competition as an ultimate good. Certainly, even in those areas of economic activity where the play of private forces has been subjected only to the negative prohibitions of the Sherman Law, this Court has not held that competition is an absolute. See *Chicago Board of Trade* v. *United States*, 246 U.S. 234; cf. Mason, Monopoly in Law and Economics, 47 Yale L.J. 34.

"Prohibitory legislation like the Sherman Law, defining the area within which 'competition' may have full play, of course loses its effectiveness as the practical limitations increase; as such considerations severely limit the number of separate enterprises that can efficiently, or conveniently, exist, the need for careful qualification of the scope of competition becomes manifest. Surely it cannot be said in these situations that competition is of itself a national policy. To do so would disregard not only those areas of economic activity so long committed to Government monopoly as no longer to be thought open to competition, such as the post office, cf., e.g., 17 Stat. 292 (criminal offense to establish unauthorized post office; provision since superseded), and those areas, loosely spoken of as natural monopolies or—more broadly—public utilities, in which active regulation has been found necessary to compensate for the inability of competition to provide adequate regulation. It would most strikingly disregard areas where policy has shifted from one of prohibiting restraints on competition to one of providing relief from the rigors of competition, as has been true of railroads. Compare, e.g., *United States* v. *Trans-Missouri Freight Assn.*, 166 U.S. 290, and *United States* v. *Joint Traffic Assn.*, 171 U.S. 505, with the Transportation Act of 1920, 41 Stat. 456, 480; *Consolidation of Railroads*, 63 I.C.C. 455." *Federal Communications Commission* v. *RCA Communications, Inc.* 346 U.S. 86, 91, 92.

We are led to the conclusion that the Douglas Tobacco Board of Trade did not violate the Sherman Act simply by exercising the regulatory powers, necessarily devolving upon it, of allocating selling time among the warehouses on the local market. As said by Mr. Justice Frankfurter concurring in *Associated Press* v. *United States*, 326 U.S. 1, 27:

> "* * * ever since the Sherman Law was saved from stifling literalness by 'the rule of reason,' *Standard Oil Co. v. United States*, 221 U.S. 1; *United States v. American Tobacco Co.*, 221 U.S. 106; it is not sufficient to find a restraint. The decisive question is whether it is an unreasonable restraint.' This depends, in essence, on the significance of the restraint in a relation to a particular industry. Compare *Chicago Board of Trade v. United States*, 246 U.S. 231, 238."

So here, the real issues revolve about the legality and reasonableness of the methods of allocating selling time. The legality of the "performance" method of allocating selling time has been sustained by the North Carolina Supreme Court and by the Federal Trade Commission.[6]

The opinion of the hearing examiner in the Matter of Wilson Tobacco Board of Trade, F.T.C. Docket No. 6262, contains a full and clear comparison of the various methods of allocating sales time from which he concludes that the performance system is best in that it transfers the area of competition from "putting dollar against dollar" in the construction of unneeded warehouse space to competition in the rendering of more and better service to the farmer.

The hearing examiner said:

> "This system compels more intensive competition where it should be—on service, instead of bankroll—and puts the control of time share on the producer rather than on the financially powerful warehouseman. However, it brings problems with it also, such as equitable provision of time for a new entrant, who has

[6] Day v. Asheville Tobacco Board of Trade, 242 N.C. 136, 87 S.E. 2d 18. In the Matter of the Wilson Tobacco Board of Trade, F.T.C. Docket No. 6262; Initial Decision of Hearing Examiner In the Matter of Asheville Tobacco Board of Trade, Inc., F.T.C. Docket No. 6490. See, also, Cooperative Warehouse v. Lumberton Tobacco Board of Trade, 242 N.C. 123, 87 S.E. 2d 25.

no previous experience of "performance to serve as a base * * *." F.T.C. Docket No. 6262 at p. 22.

The Commission, in its decision of August 23, 1956, approved that finding of the Hearing Examiner, saying in part:

> "Weighing and judging the reasonableness of the performance system in the light of its intent and effect, and in the framework of realities of the market place, as established on the record here, there remains no alternative but for us to conclude on the whole record that the initial decision is correct in upholding the reasonableness of the performance system." F.T.C. Docket No. 6262, p. 5.

As noted by the Hearing Examiner, however, a difficult problem is presented under the performance system to provide for a new entrant with no performance experience. In that case, the Board's regulation of December 5, 1952,

> "provided that any newcomer on the Wilson market should be allotted for his ensuing first year of operation, the same amount of selling time as the last previous entrant (Liberty) had for that year, provided

---

"In summary, then, the Hearing Examiner is of the opinion and therefore finds:

"1. That under the exigencies and unchangeable market conditions, generally, and at Wilson, North Carolina specifically, the performance system of allocating sales time is per se a reasonable regulation and therefore not illegal because,

"(a) it promotes rather than hinders competition among warehousemen by putting a premium on additional sales effort—solicitation, advertising, etc. and increases the area of that competition,

"(b) puts the competitive emphasis solely on the warehouseman's economic function—service,

"(c) penalizes laziness and other inefficiency in that service; * * *." F.T.C. Docket No. 6262, at p. 33.

> the new entrant built as large a warehouse as Liberty's; if not, then time is cut down in proportion to the size built." F.T.C. No. 6262, p. 31.

The Hearing Examiner concluded that that regulation was an unreasonable restraint of trade, saying:

> "It is, in the hearing examiner's opinion, inherently unreasonable and unfair to fix a man's opportunity to engage in competition on the basis of the ability and performance of only one of his competitors. A broader base, such as an average of all, for one year, or over a period, would be more reasonable and, of course, some account should be taken of the entrant's initial investment, in relation to that of others, already operating." F.T.C. Docket No. 6262, p. 32.

That part of the initial decision was not appealed, though the Commission in a footnote to its decision commented:

> "The resolution in question established an allotment of selling time for newcomers on the Wilson market, the same amount as the last previous entrant (Liberty) had for that year provided the new entrant built a warehouse equally as large as Liberty with proportionate reduction of time if smaller. The hearing examiner found it to be unreasonable and unfair to fix opportunity to compete on the basis of the ability and performance of only one competitor, suggesting some other broader basis such as an average of all competitors on the market. Respondents have not appealed from that finding." F.T.C Docket 6262, at p. 3.

The case of *Day* v. *Asheville Tobacco Board of Trade*, 242 N.C. 136, 87 S.E. 2d. 18, involved a by-law strikingly similar to the by-law adopted by the Douglas Board of Trade. The selling time was allotted on the basis of the sales of the warehouses the previous year, with a provision that a new warehouse larger than average size would re-

ceive the same selling time as the average of the other warehouses. The Court said:

> "And the rule by which the allotment was made to plaintiff by the Board appears fair and equitable. Indeed, it does not appear that there is any restraint of trade in the rule." 87 S.E. 2d at p. 24.

The allocation of selling time among the local warehouses, as has been shown, was a necessity. So long as they were in unanimous agreement there was no objection to the "Unit Floor-Space System." With the advent of a new and powerful competitor, no agency existed for the necessary allocation of time except the Douglas Board of Trade. The time within which it had to take action was brief. Construction of the new warehouse began in May. Various, albeit heated, discussions ensued. The warehouse was completed the last of June, and the new by-law adopted the 10th of July, five days before the opening of the 1954 season. The plaintiffs themselves, by the timing of their project, bear the primary responsibility for the extremely brief period of time within which action by the Board of Trade became necessary.

The most directly pertinent decisions then available by which the Board of Trade might chart its course were those which we have discussed. Under those decisions, we think that it was not unreasonable for the Board of Trade to conclude that the allotment to the newcomer of more than one-third of the total available selling time was inequitable, and instead to allot to it one-seventh of such time, leaving six-sevenths thereof for apportionment among the six other warehouses in accordance with their performances during the preceding year.*

* There was already a surplus of warehouse floor space on the Douglas market and we think that the newcomer was entitled to no special consideration because of the unusual size of his warehouse.

Some doubt is cast upon that conclusion by the Initial Decision of the Hearing Examiner of March 29, 1957, in the matter of Asheville Tobacco Board of Trade, Inc., F.T.C. Docket No. 6490, in which he concluded that a similar new warehouse provision was in restraint of trade, saying:

> "* * * it is basically unfair and arbitrary to limit the competitive opportunity of a new entrant in an market to the average competitive ability of all his established competitors. The very idea of such arbitrary limitation of opportunity is alien to the whole concept of the free-enterprise system." F.T.C. Docket 6490, p. 19.

In that decision, the Hearing Examiner declined to follow the precedent of *Day v. Asheville Tobacco Board of Trade*, 242 N.C. 136, 87 S.E. 2d 18, and erroneously stated that the Federal Trade Commission had approved the Hearing Examiner's finding that the regulation allocating selling time to new entrants adopted by the Wilson Tobacco Board of Trade was an unreasonable restraint of trade, when, as we have noted, there was no appeal from that part of the Initial Decision in F.T.C. Docket No. 6262. The Hearing Examiner in the Asheville Case, *supra*, made no suggestion as to how the problem may be solved under the performance system to provide for a new entrant with no performance experience. Without some such solution, the merits of the performance system are largely nullified. We think the solution reached by the Douglas Board of Trade was substantially in accord with that approved by the North Carolina Supreme Court in *Day v. Asheville Tobacco Board of Trade*, *supra*, and with that suggested by the Hearing Examiner in the Wilson Case, *supra*, and that it was not an unreasonable restraint of trade. Thus far, that is as to the year 1954, we are in agreement with the district court.

As to the year 1955, however, the case for the plaintiffs is stronger. We can see no justification for the limitation

on increases and decreases in selling time to 3½ per cent, meaning, as construed and applied, not 3½ per cent of the total available selling time but 3½ per cent of the selling time allotted to the particular warehouse. Thus plaintiffs' 1954 allocation of 14.28 per cent was increased by less than one-half per cent (3½% of 14.28%) to 14.77 per cent. Whether a like limitation appearing in the by-law involved in *Day v. Asheville Tobacco Board of Trade*, *supra*, was construed and applied in the same manner we cannot know, for the opinion does not discuss this 3½ per cent limitation. No such limitation was involved in the Matter of Wilson Tobacco Board of Trade, F.T.C. Docket No. 6262, but a similar limitation was held to be in restraint of trade in the Initial Decision in the Matter of Asheville Tobacco Board of Trade, F.T.C. Docket No. 6490, the Hearing Examiner stating:

> "Respondents adopted the gain-or-loss proviso, by which they assured themselves, not only that the established warehouses could not lose more than 3½% of their selling time in any one season by reason of business vicissitudes encountered during the preceding year, but that neither the new entrant nor any of the established warehouses could gain more than that amount in any one season." Again in the *Wilson* case, *supra*, the Hearing Examiner approved the performance system because he found that it possessed 'three requisites of competition: opportunities for competitors to grow; opportunities for competitors to appeal for patronage by improving or changing services; no restraint upon the farmer's freedom of election to patronize the competitor of his choice'. The gain-or-loss proviso obviously violates all these requisites of fair competition. In conjunction with the new-warehouse proviso, this limitation would have compelled the new entrant to wait between three and four years, under optimum conditions, before receiving the

just proportion of the available selling time which, in a freely competitive system, would have been accorded to him promptly upon his entry into the market. This seems too heavy a competitive handicap for any business to be required to carry." F.T.C. Docket No. 6490, p. 19.

The 3½ per cent limitation, we think, practically froze the seven warehouses in their 1954 competitive positions, eliminated in major part the hope of gain and the risk of failure inherent in a true performance system, and, if further evidence which may be taken upon remand shows that such limitation tends to prejudice the public interest, it may constitute an undue and unreasonable restraint of trade and commerce.

The question remains as to whether the action survived against the personal representatives of the estate of one of the defendants, R. E. Holcomb, who died on October 26, 1955, after the commencement of the action and after process had been served on him. The district court, while considering that the personal representatives had become parties to the cause, denied their motion and plea in abatement "in view of the order of this Court dismissing said cause as to all defendants."

Combinations in restraint of trade or tending to create or maintain a monopoly gave rise to causes of action at common law.[10] As we noted in *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 214 F. 2d 891, 893, however,

[9] See Hudson Sales Corp. v. Waldrip, 5th Cir., 211 F. 2d 268, 272; Kinnear-Weed Corp. v. Humble Oil & Refining Co., 5th Cir., 214 F. 2d 891, 894, and cases cited; Shotkin v. General Electric Co., 10th Cir., 171 F. 2d 232, 238.

[10] Standard Oil Co. v. United States, 221 U.S. 1, 25, et seq.; 36 Am. Jur., Monopolies, Sec. 5; 58 C.J.S., Monopolies, Sections 15 and 16.

public injury alone justifies the threefold increase in damages.

The policy of the federal statute, we think, requires the survival of the cause of action to the extent that actual damages may be recovered.[11] Trebling of the damages seems to us to be in the nature of a penalty for the public wrong, and we do not think that the personal representatives would be liable for more than actual damages.[12] A different result would not be required even if the question were determined by the law of the State of Georgia.[13]

The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and Remanded.

---

[11] Sullivan v. Associated Billposters & Distributors, 2nd Cir., 6 F. 2d 1000, 1012; Barnes Coal Corporation v. Retail Coal Merchants Assn., 4th Cir., 128 F. 2d 645, 648; compare Cox v. Roth, 348 U.S. 207, 209, 210; see however, Sun Theatre Corp. v. R.K.O. Radio Pictures, 7th Cir., 213 F. 2d 284.

[12] Haskell v. Perkins, D.C. N.J., 28 F. 2d 222; compare Bowles v. Farmers National Bank of Lebanon, Ky., 6th Cir., 147 F. 2d 425.

[13] Code of Georgia Annotated:

"3-505 (4427) Action for Tort Not to Abate by Death of Either Party. No action for a tort shall abate by death of either party, where the wrongdoer received any benefit from the tort complained of; nor shall any action, or cause of action, for the recovery of damages for homicide, injury to person, or injury to property abate by the death of either party; but such cause of action, in the case of the death of the plaintiff, shall, in the event there is no right of survivorship in any other person, survive to the personal representative of the deceased plaintiff; and in the case of the death of the defendant, shall survive against said defendant's personal representative. However, in the event of the death of the wrongdoer before suit shall have been brought against him, the personal representative of such wrongdoer in such capacity shall be subject to suit just as the wrongdoer himself would have been during his life; providing that there shall be no punitive damages. (Acts 1889, p. 73; 1935, pp. 94, 95; 1952 p. 224.)"

2. Second Opinion, 266 F. 2d 636.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17401

B. B. ROGERS, ET AL., *Appellants*,

v.

THE DOUGLAS TOBACCO BOARD OF TRADE, INC., ET AL., *Appellees*.

Appeal from the United States District Court for the Southern District of Georgia

(May 5, 1959)

Before RIVES, JONES, and WISDOM, Circuit Judges.

RIVES, Circuit Judge: This action is for treble damages for alleged violations of the Sherman Anti-Trust Act[1] in the allocation of selling time among the tobacco warehouses on the Douglas, Georgia, market. Most of the facts out of which this cases arises, together with a description of the tobacco auction system, are set forth in our opinion on former appeal[2] and need not be repeated at length. The original complaint had involved only the 1954 and 1955 tobacco market seasons. The first appeal was from the judgment of the district court sustaining the motions of the defendants for judgment on the pleadings. As to the year 1954 the decisive question was whether the provision for the allocation of selling time to a new warehouse was an unreasonable, and hence illegal, restraint of trade. We agreed with the district court that it was not shown to be such. In the year 1955, the plaintiff was affected for the first time by

[1] See 15 U.S.C.A. Sections 1, 2, and 15.

[2] Rogers v. Douglas Board of Trade, 5th Cir. 1957, 244 F. 2d 471

a 3½ per cent limitation provision on increases and decreases in selling time as that limitation was construed and applied. We reversed as to the 1955 tobacco market season and remanded the cause for further proceedings, saying:

> "The 3½ per cent limitation, we think, practically froze the seven warehouses in their 1954 competitive positions, eliminated in major part the hope of gain and the risk of failure inherent in a true performance system, and, if further evidence which may be taken upon remand shows that such limitation tends to prejudice the public interest,[9] it may constitute an undue and unreasonable restraint of trade and commerce.
>
> [9] See Hudson Sales Corp. v. Waldrip, 5 Cir., 211 F.2d 268, 272; Kinnear-Weed Corp. v. Humble Oil & Refining Co., 5 Cir., 214 F.2d 891, 894, and cases cited; Shotkin v. General Electric Co., 10 Cir., 171 F.2d 236, 238."

(*Rogers v. Douglas Tobacco Board of Trade*, 244 F. 2d 471, 482-3).

On remand a supplemental complaint was filed covering the 1956 and 1957 tobacco market seasons. After trial before a jury and verdict and judgment for the defendants, this appeal was taken.

On the first appeal, the question as to whether the tobacco auction sales on the Douglas Market were in interstate commerce was not argued by any of the parties, and we had assumed that they were. On remand, at the commencement of trial, the plaintiffs moved the district court to "declare, as a matter of law, that the auction sale of tobacco on the Douglas Market at Douglas, Georgia, is in interstate commerce." In response the court ruled: "That is a question of proof. I will leave that up to you as a question of proof." A considerable part of the evidence centered around that

question. For example, the plaintiffs' first witness testified:

> "A. Well, all of the tobacco, I believe, is eventually shipped into other states. I believe we have one concern which does some redrying on the Douglas Market, which happens to be the Douglas Tobacco Company which redries a small percentage of the tobacco there, but the most of it on the same day of sale, or the following day, is shipped by car or by truck to North Carolina or Virginia and some of it even goes into Kentucky to redrying plants and manufacturing and storage plants."

The facts thus testified were not controverted, but the defendants sought to prove that the 3½ per cent limitation did not affect interstate commerce by inferring that at the time of the local auction sale the interstate character had not been impressed on the commerce, for example:

> "Q. *Mr. Royster*, what effect does the three and a half percent limitation on the warehousemen have on the flow of tobacco through the market and into interstate commerce?
>
> "A. It doesn't have any effect on that at all.
>
> "Q. Will you state why you make that statement? what are your reasons for making that statement?
>
> "A. Well, going back to the testimony already given, there are a certain number of baskets allotted to each market and it doesn't effect interstate commerce, or the flow of tobacco whether it is sold in A house or B house, two houses or six houses. As soon as the sale is completed and the market has sold its allotment of tobacco, of course, the tobacco, as soon as possible, is moved out, and from the Georgia area, there being only one redrying plant in Georgia and it a very small one it moves into principally North Carolina and

to some extent into the State of Virginia for redrying and processing."

"Q. Now, *Mr. Loftis*, what effect, if any, does this three and a half percent rule have on the flow of tobacco through the Douglas Tobacco market?

"A. None that I can see.

"Q. Why do you make that statement?

"A. Because the Douglas Tobacco Market, as it has been shown, has allocated to it 4400 baskets per day, which it may sell, and the three and a half percent has no bearing whatsoever to the amount of tobacco allotted to the market.

". . . . . .

(On cross-examination)

"Q. *Mr. Loftis*, if one warehouse on the Douglas Tobacco Market was to get 4400 baskets of tobacco—concede that now, it is possible, is it not? (No answer.) Would that have any effect on Interstate Commerce as between those other warehouses there?

"A. If one warehouse was to get it all?

"Q. Yes, sir.

"A. And the others couldn't get it?

"Q. Yes, sir.

"A. The companies would buy every bit of it and ship it right out.

"Q. Would that effect commerce in any way?

"A. It might affect the individual, but I don't see where it would affect commerce because commerce would have it all in the trade."

In its charge to the jury, the district court repeated five times that, in order to recover, the plaintiffs must prove by a preponderance of the evidence four ultimate facts:

"First, that the three and one-half per cent limit affects interstate or foreign commerce;

"Second, that the three and one-half per cent limit prejudices or tends to prejudice the public interest;

"Three, that the three and one-half per cent limit constitutes an unreasonable restraint of trade; and

"Four, that the plaintiffs have suffered a private injury and been damaged as a direct result of the three and one-half per cent limitation."

The plaintiffs' counsel objected, " . . . to the continued mentioning of the four elements in the charge throughout as being prejudicial to the plaintiffs. It was a continued repetition, if Your Honor please, and it placed an undue burden on the plaintiffs." In response, the district court further instructed the jury:

"Now, gentlemen of the jury, I did not want to give undue emphasis to the four ultimate facts which I read to you. I read them to you two or three times, but I did not mean to give it any undue emphasis. I was just trying to explain the law to you as I see it, and don't give the charge as to those four ultimate facts any more emphasis than you do the balance of the charge."

After the jurors had deliberated for about some two hours, they asked for additional instructions:

"The Court: Did you gentlemen want same additional instructions?

"A Juror: Yes, sir. We want a re-statement of those four points, the exact wording of those four points.

". . . . . .

"A Juror: We would like to write it down.

"The Court: All right, you can write it down, gentlemen. I charge you that in order to carry their burden of proof, the plaintiffs must prove four ultimate facts:

"(Note: The Court reads slowly while the jury writes down the instructions.)

"1. That the three and one-half per cent limit affects interstate or foreign commerce That is No. 1.

"2. That the three and one-half per cent limit prejudice the public interest.

"3. That the three and one-half per cent limit constitutes an unreasonable restraint of trade.

"4. That plaintiffs have suffered a private injury and been damaged as a direct result of the three and one-half per cent limitation.

"Now, I charge you that if the public has been damaged it might be an unreasonable restraint of trade. That is a question of fact for you gentlemen to determine. Now, those four facts have to be proved. Not just three, but all four. Not one, not two, not three, but all four of them have to be proved by a preponderance of the testimony. Is that what you gentlemen wanted?

"The Jury: Yes, sir."

The jurors retired to deliberate further, but did not reach a verdict on that day. The following morning they again returned for additional instructions:

"The Court: Did you gentlemen want some additional instructions?

"The Jury: Your Honor, would you read or explain the Anti-trust Act, the part of the law that would affect interstate commerce?

"The Court: Do you want a definition of interstate commerce?

"The Jury: Yes, sir, or explain it to us.

"The Court: I will give you a definition of interstate commerce. This is from Black's Law Dictionary:

"'Traffic, intercourse, commercial trading, or the transportation of persons or property between or among the several states of the Union, or from or between points in one state to points in another state. Commerce between two states is between places lying in different states.'

"Now, I will give you another definition in another book. This is 'Words and Phrases':

"'Interstate Commerce: Commerce among the states cannot stop at the boundary line of each state but may be introduced into the interior. It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in the state or between different parts of the same state which does not extend to affect other states. Interstate Commerce or commerce among the several states is commerce that concerns more than one state.'

"The Court: Now, is that what you gentlemen wanted?

"The Jury: Read that first definition again.

"The Court: 'Traffic, intercourse, commercial trading, or the transportation of persons or property between or among the several states of the Union, or from or between points in one state to points in another state.'

"Now, is that what you gentlemen wanted, or is there anything else that I might be able to help you gentlemen on?

"The Jury: No, sir."

The plaintiffs' counsel then noted the following objection:

"We except to the Court's definition in defining Interstate Commerce in not instructing the jury that

the auction sale of tobacco is interstate commerce. Citing as our authority the case of Curry vs. Wallace, Secretary of Agriculture, 301 United States."

The applicable legal principles have been so long settled as to have become commonplace. For example, in *Dahnke-Walker Co. v. Bondurant*, 1921, 257 U.S. 282, 290, 291, the Supreme Court said:

> "The commerce clause of the Constitution, Art. I, § 8, Cl. 3, expressly commits to Congress and impliedly withholds from the several States the power to regulate commerce among the latter. Such commerce is not confined to transportation from one State to another, but comprehends all commercial intercourse between different States and all the component parts of that intercourse. Where goods in one State are transported into another for purposes of sale the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination and while they are in the original packages. *Brown v. Maryland*, 12 Wheat. 419, 446-447; *American Steel & Wire Co. v. Speed*, 192 U.S. 500, 519. On the same principle, where goods are purchased in one State for transportation to another the commerce includes the purchase quite as much as it does the transportation. *American Express Co. v. Iowa*, 196 U.S. 133, 143. This has been recognized in many decisions construing the commerce clause."

Practically the same thoughts were repeated in *Federal Trade Commission v. Pacific Paper Ass'n.*, 1927, 273 U.S. 52, 64.

Coming more specifically to the particular transactions involved in this case, the Tobacco Inspection Act of 1935, 7 U.S.C.A. §511, et seq., and the decision of the Supreme Court upholding the constitutionality of that Act, *Currin*

v. Wallace, 1939, 306 U.S. 1, are pertinent. The first section of that Act provides:

> "(i) 'Commerce' means commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof; or within any Territory or possession, or the District of Columbia. For the purposes of this chapter (but not in any wise limiting the foregoing definition) a transaction in respect to tobacco shall be considered to be in commerce if such tobacco is part of that current of commerce usual in the tobacco industry whereby tobacco or products manufactured therefrom are sent from one State with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where purchase or sale is either for shipment to another State or for manufacture within the State and the shipment outside the State of the products resulting from such manufacture. Tobacco normally in such current of commerce shall not be considered out of such current through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this chapter. For the purpose of this paragraph the word 'State' includes Territory, the District of Columbia, possession of the United States, and foreign nations." 7 U.S.C.A. §511(i).

Subject to a referendum as to the desire of the tobacco growers affected, the Secretary of Agriculture "is authorized to designate those auction markets where tobacco bought and sold thereon at auction, or the products customarily manufactured therefrom, moves in commerce." 7 U.S.C.A. §511d. The Douglas Market is such a "designated" market where the Department of Agriculture's

Grading Service inspects, certifies the weight of, and grades tobacco sold at auction.

In *Currin v. Wallace*, 1939, 306 U.S. 1, tobacco warehousemen and auctioneers in Oxford, North Carolina, attacked the constitutionality of the Tobacco Inspection Act. Their counsel argued:

> "The transaction of offering for sale tobacco at auction on warehouse floors is not a transaction in interstate commerce.
>
> "After the tobacco has gone through the auction sale the farmer may, and often does, reject the offered price and take his tobacco away.
>
> "The tobacco acquires interstate character only when the sale is consummated and possession passes from grower to purchaser. Tobacco, moving from the fields to the curing barns, and from the curing barns to the warehouse floors, is no part of interstate commerce. Observe that the inspection is required prior to the offering for sale. Control over commodities up to the point of sale is reserved to the States by the Tenth Amendment." Summary of argument by petitioners, 306 U.S. 3.

In response to that argument, Mr. Chief Justice Hughes speaking for the Court said:

> "Plaintiffs urge that tobacco 'is not inherently an interstate commodity'; that the auction transaction is not a sale as title is not passed until the grower accepts the price; that after the auction the grower may, and often does, reject the bid and he may take his tobacco away; that the inspection required by the Act is done prior to the offering for sale; and that until sale and delivery to the purchaser the tobacco is not in interstate commerce and its control is reserved to the State. These objections are untenable. The record

shows that the sales consummated on the Oxford auction market are predominantly sales in interstate and foreign commerce. The principal purchasers are few in number and in the main are engaged in the export trade or in the manufacture of tobacco products in other States. It appears that in a given week, shortly before the beginning of this suit, approximately 2,000,000 pounds of tobacco were sold on the Oxford market, only 15.3 per cent of which were definitely destined for manufacture in North Carolina. About 14 per cent were in part for manufacture in North Carolina and in part for other States, and about 62 per cent moved directly into foreign commerce. The fact that the growers are not bound to accept bids, and in certain instances reject them, does not remove the auction from its immediate relation to the sales that are consummated upon the offers that the growers do accept. The auction in such cases is manifestly a part of the transaction of sale. So far as the sales are for shipment to other States or to foreign countries it is idle to contend that they are not sales in interstate or foreign commerce and subject to congressional regulation. Where goods are purchased in one State for transportation to another the commerce includes the purchase quite as much as it does the transportation. *Swift & Co. v. United States*, 196 U.S. 375, 398, 399; *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 290, 291; *Lemke v. Farmers Grain Co.*, 258 U.S. 50, 54; *Stafford v. Wallace*, 258 U.S. 495, 519; *Hanagan v. Federal Coal Co.*, 267 U.S. 222, 225; *Shafer v. Farmers Grain Co.*, 268 U.S. 189, 198; *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 10."

Currin v. Wallace, supra, 306 U.S. 9, 10.

It is only because there has been so much apparent confusion over this issue in the district court that we have

not disposed of it as briefly and succinctly as did the Fourth Circuit in the recent case of *Asheville Tobacco Board of Trade, Inc., v. Federal Trade Commission*, No. 7678, decided January 20, 1959:

> "Petitioners further contend that the adoption of regulations governing 'the internal allocation of selling time' to the several warehouses is not in interstate commerce. The Commission has no jurisdiction to proscribe unfair methods of competition that merely *affect* interstate commerce; they must be *in* such commerce. *F.T.C. v. Bunte Bros.*, 312 U.S. 349; cf. *Chamber of Commerce of Minneapolis v. F.T.C.*, 8 Cir., 13 F. 2d 673, 684. Tobacco auctions are an integral and indispensable part of interstate commerce in tobacco. *Currin v. Wallace*, 306 U.S. 1, 10, aff'g *Wallace v. Currin*, 4 Cir., 95 F.2d 856, 859, 863. The practices of the Board and its members at issue in this case are an essential part of such commerce. *American Federation of Tobacco Growers, Inc. v. Neal*, 4 Cir., 183 F.2d 869."

The district court should have instructed the jury that auction sales of tobacco on the Douglas Market are a part of, in, and themselves constitute interstate commerce, and should not have left that question to plague and confuse the jury.

It is a question for the jury to decide as to whether the 3½ per cent limitation as construed and applied[3] constitutes an *unreasonable* restraint of trade or commerce within the meaning of the Sherman Anti-Trust Act. That is, of course, a mixed question of law and fact, but its resolution, under appropriate instructions, difficult as they may be, must ultimately be left to the jury. *Fleitman* v.

[3] There was testimony tending to prove that it was construed and applied even more restrictively than was indicated on former appeal. See 244 F.2d at 482.

Welsbach Co., 1916, 240 U.S. 27; *Thomsen v. Cayser*, 1917, 243 U.S. 66, 88, 89; *Ring v. Spina*, 2nd Cir. 1948, 166 F.2d 546, 550; *Raytheon Mfg. Co. v. Radio Corporation of America*, 1st Cir. 1935, 76 F.2d 943, 950, aff'd 296 U.S. 459. The strong language which we used on the former appeal in describing the effect of the 3½ per cent limitation, and which has been quoted near the beginning of this opinion, should not be construed as any indication of how the jury should decide that issue, nor permitted to influence the jury's verdict.

In *Asheville Tobacco Board of Trade v. Federal Trade Commission*, *supra*, the Fourth Circuit sustained the Commission's condemnation of a similar 3½ per cent limit, but further observed:

> "... There are, however, a number of reasons why it may be desirable that there be some limit on the possible gain or loss to an individual warehouse in a single year. Loss or damage to a warehouse by fire or other casualty, illness of the warehouseman, or other fortuitous circumstances, may cause an abnormal reduction in the business of a warehouse in a particular year, which should not be perpetuated by a performance rule without some limiting proviso. Again, a warehouseman with large financial resources might attempt to monopolize the market through advertising campaigns, bidding in farmers' tobacco at prices above those which his competitors can afford, and other methods, which could be used for several years until his selling time is abnormally increased, and his competitors of more limited means are driven from the market, even though they have rendered adequate service and have helped to build up the market over the years. A reasonable limitation on the percentage of gain or loss in any one year would not violate the antitrust laws."

The testimony in the present case tends to sustain the Fourth Circuit's view that some limitation on the percentage of gain or loss in any one year is reasonable, and, we think, that question, together with the reasonableness of the particular 3½ per cent limit, as construed and applied by the defendants, must be left to the jury under proper instructions.

In our opinion on former appeal, we said that the plaintiffs upon remand must produce evidence to show that the 3½ per cent limitation tends to prejudice the public interest. In the Sherman Act Congress has determined that certain prohibited activities are injurious to the public. *Radovich v. National Football League*, 1957, 352 U.S. 445, 453. As to classes of restraints which from their "nature or character" are unduly restrictive, Congress has determined its own criteria of public harm. *Klor's Inc. v. Broadway-Hale Stores, Inc.*, U.S. No. 76, October Term 1958, decided April 6, 1959. In restraints, like the present one to which "the rule of reason" applies, while the jury should not, and cannot properly, reject the policy of the Sherman Act which has been determined by Congress, it must still decide whether the particular conduct is reasonably calculated to prejudice the public interest which that Act is designed to protect. *Wilder Mfg. Co. v. Corn Products Co.*, 1915, 236 U.S. 165, 174; *Apex Hosiery Co. v. Leader*, 1940, 310 U.S. 469, 493; *Mandeville Farms v. American Crystal Sugar Co.*, 1948, 334 U.S. 219, 242, 243. That does not mean that specific public injury must be proved before a private person can recover, but before it can be said that the conduct is forbidden as *unreasonably* restraining trade or commerce within the meaning of the Sherman Anti-Trust Act it must appear that it *tends* or is *reasonably calculated* to prejudice the public interest.

Upon the former appeal we upheld, under the circumstances there disclosed, the reasonableness and validity of the new warehouse provision intended to discourage

overbuilding by limiting the amount of selling time which a new warehouse might receive for its first year, and we adhere to that decision. Our holding was, however, limited to the first year, 1954, and was not intended to prevent consideration of the new warehouse provision in determining whether the 3½ per cent limitation for the years 1955 and those following is an unreasonable restraint on trade. For example, that 3½ per cent limitation might be unreasonable if, combined with the new warehouse provision, it would operate to unduly discourage desirable building operations. See *Asheville Tobacco Board of Trade v. Federal Trade Commission*, *supra*.

Number one[4] of the four so-called ultimate facts upon which the district court placed so much emphasis is either erroneous or misleading,[5] and should not be submitted to the jury, because, as a matter of law, the auction sales of tobacco are *in* interstate commerce. Number two[6] is not a separate ultimate fact, but is a part of the test of an unreasonable restraint of trade under number three.[7] On that and on number four,[8] the plaintiffs, upon a re-trial have the burden of proof.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

---

[4] "That the three and one-half per cent limit affects interstate or foreign commerce."

[5] It might be only misleading because "affects" might be construed to mean "burdens."

[6] "That the three and one-half per cent limit prejudices or tends to prejudice the public interest."

[7] "That the three and one-half per cent limit constitutes an unreasonable restraint of trade."

[8] "That the plaintiffs have suffered a private injury and been damaged as a direct result of the three and one-half per cent limitation."

APPENDIX B

JUDGMENTS BELOW

1. First Judgment.

Judgment.

Extract from the Minutes of May 9th, 1957.

No. 16284.

B. B. Rogers, et al.,

versus

The Douglas Tobacco Board of Trade, Inc., et al.

Charles B. Holcomb, Administrator, and Virginia H. Gambill, Administratrix, of the estate of Rady E. Holcomb, deceased,

versus

B. B. Rogers, et al.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered and adjudged that the appellees, The Douglas Tobacco Board of Trade, Inc., and others, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

2. Second Judgment.

Judgment.

Extract from the Minutes of May 5, 1959

No. 17401.

B. B. Rogers, et al.,

versus

The Douglas Tobacco Board of Trade, Inc., et al.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was argued by counsel:

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered and adjudged that the appellees, The Douglas Tobacco Board of Trade, Inc., and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

ILE COPY

Office-Supreme Court, U.S.
FILED
AUG 28 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 260

B. B. ROGERS, B. S. CORRELL, W. O. NEWELL, et al.,
Petitioners

v.

THE DOUGLAS TOBACCO BOARD OF TRADE, INC., a corporation, et al., *Respondents*

On Petition For Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

BRIEF IN OPPOSITION

WILLIAM SIMON
HAROLD F. BAKER
of Howrey & Simon
1707 H Street, N. W.
Washington 6, D. C.

E. KONTZ BENNETT
Post Office Box 178
Waycross, Georgia

MONTGOMERY PRESTON
118 East Ashley Street
Douglas, Georgia

Attorneys for Respondents

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
QUESTIONS PRESENTED	1
STATEMENT	2
A. Tobacco Markets	2
B. Regulation of Tobacco Markets	2
C. Need for Allocating Selling Time	3
D. Systems of Allocating Selling Time	4
E. Proceedings Below	7
ARGUMENT	9
I. Petitioners Merely Seek to Deny Respondents Trial by Jury	9
A. Petitioners Are Foreclosed From Urging a Per Se Rule	11
B. The Courts and Federal Trade Commission Are Unanimous in Applying a Test of Reasonableness	11
C. This Case Presents Complex and Disputed Factual Questions	13
D. The Court Below Correctly Applied the Test of Reasonableness	15
II. No Issues of Widespread Significance Are Presented	19
III. No Conflicting Decisions	20
IV. No Conflict With Decisions of This Court	21

TABLE OF AUTHORITIES

CASES

American Construction Co. v. Jacksonville, T. & K. R. Co., 148 U.S. 372 (1893)	23
Asheville Tobacco Board of Trade v. F.T.C., 263 F.2d 502 (4th Cir. 1959)	3, 12, 14, 20

Page

In the Matter of Asheville Tobacco Board of Trade, FTC Dkt. No. 6490 ..... 11, 12, 19
Bright Belt Warehouse Ass'n v. Tobacco Planters Warehouse, 231 N.C. 142, 56 S.E. 2d 391 (1949) 19
Busby v. Electric Utilities Employees Union, 323 U.S. 72 (1944) 22
Chicago Board of Trade v. United States, 246 U.S. 231 (1918) 11
Cooperative Warehouse v. Lumberton Tobacco Board of Trade, 242 N.C. 123, 87 S.E. 2d 25 (1955) 19
Day v. Asheville Board of Trade, 242 N.C. 136, 87 S.E. 2d 18 (1955) 12, 19
Fashion Originators Guild v. Federal Trade Commission, 312 U.S. 457 (1941) 16
FTC v. American Tobacco Co., 274 U.S. 543 (1927) 20
Gray v. Central Warehouse Co., 181 N.C. 166, 106 S.E. 657 (1921) 19
International Salt Co. v. United States, 332 U.S. 392 (1947) 16
Kinston Tobacco Board of Trade v. Liggett & Myers Tobacco Co., 235 N.C. 737, 71 S.E. 2d 21 (1952) 19
Klor's v. Broadway-Hale Stores, 359 U.S. 207 (1959) 21, 22
Messinger v. Anderson, 225 U.S. 436 (1912) 20
NLRB v. Pittsburgh S.S. Co., 340 U.S. 498 (1951) 20
Public Service Commission v. Brashear Lines, 306 U.S. 204 (1939) 10
Rogers v. Douglas Tobacco Board of Trade, 244 F.2d 471 (5th Cir. 1957) 3, 8, 12, 18
Rogers v. Douglas Tobacco Board of Trade, 266 F.2d 636 (5th Cir. 1959) 9, 10, 12, 14, 15, 20, 21, 22
Southern Power Co. v. Public Service Co., 263 U.S. 508 (1924) 15
Triplett v. Lowell, 297 U.S. 638 (1936) 22
U.S. v. Johnston, 268 U.S. 220 (1925) 20
In the Matter of Wilson Tobacco Board of Trade, FTC Dkt. No. 6262 ..... 3, 5, 7, 12, 16, 17, 19

STATUTES

7 U.S.C.A. § 511 et seq. (1952) 3
7 U.S.C.A. § 1311 et seq. (1952) 3
15 U.S.C.A. § 1 (1951) 15
Georgia Code Annotated, Title 111, §§ 301-4 2

RULES

Page

Rule 19(b) 21

MISCELLANEOUS

U. S. Dept. of Agriculture, Marketing Research Report No. 101, Sept. 1955 ..... 8, 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 260

B. B. ROGERS, B. S. CORRELL, W. O. NEWELL, et al.,
Petitioners

v.

THE DOUGLAS TOBACCO BOARD OF TRADE, INC., a corporation, et al., *Respondents*

On Petition For Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

BRIEF IN OPPOSITION

QUESTIONS PRESENTED

1. Where petitioners successfully appealed from an adverse jury verdict and obtained a reversal and remand for a new trial, should this Court deny respondents a trial by jury and itself decide questions of fact and law merely because petitioners assert that the trial court may again commit error in the conduct of a new trial.

2. Whether, in an action for treble damages under the Sherman Act, the court below was correct in applying the test of reasonableness in view of the necessity of regulation and the complex economic and marketing facts.

STATEMENT[1]

A. *Tobacco Markets.* A tobacco market consists of a number of public auction warehouses to which farmers deliver their tobacco for auction to buyers such as American Tobacco Company, Liggett & Myers, etc.

B. *Regulation of Tobacco Markets.* Many aspects of the production and marketing of tobacco are subject to detailed governmental regulation at both the state and federal levels. Production is controlled (7 U.S.C.A. § 1311, et seq.); grading standards are maintained (7 U.S.C.A. § 511, et seq.); support prices are established and the Commodity Credit Corporation administers the price support program by means of contracts with public auction warehouses (2 R. 477-8); warehouse commissions and charges are fixed by statute (Ga. Code Ann., Title 111, §§ 301-4).

Finally, the detailed and complicated operation of each local tobacco market is governed by local tobacco boards of trade such as respondent Board. Such boards of trade, among other things, promulgate regulations: (1) governing the entry of new warehouses and allotment of selling time thereto; and (2) the allocation of selling time among existing warehousemen.

---

[1] Two appeals have been taken by petitioners to the circuit court, Nos. 16,284 and 17,401. The records in the circuit court will be referred to as 1 R and 2 R, respectively.

C. Need for Allocating Selling Time. The necessity for the allocation of selling time is well settled and is not in issue here.[2] It is however, helpful to understand the reasons for regulation.[3]

1. Tobacco is perishable and must be processed within a short time after purchase.

2. Each tobacco manufacturing company sends one or more buyers to a market. A buyer representing each of the several tobacco companies constitutes a "set of buyers." A set of buyers must be present before a competitive auction can be conducted. If each company sends only one buyer, there is one set of buyers, and the market is termed a "one set market." The number of sets of buyers is not within the control of the local board of trade; it is determined solely by the buying companies. The Douglas market has two sets of buyers and only two simultaneous auction sales may be held.

3. The buyers purchase tobacco at auction at a fixed rate, 400 baskets per hour.

4. The number of hours per day during which buyers may purchase tobacco on a market is fixed at 5½ hours by the Burley Tobacco Association (not a party to this case). This is the normal work day for federal graders. The purpose is to prevent tobacco from

---

[2] First opinion below, 244 F. 2d 471, 481; See also *Asheville Tobacco Board of Trade* v. *FTC*, 263 F. 2d 502, 505 (1959); *In the Matter of Wilson Tobacco Board of Trade*, FTC Dkt. No. 6262, Initial Decision, December 20, 1955, affirmed by order and opinion of full Commission, August 23, 1956.

[3] These are set forth in detail at 1 R. 85-90 and 244 F. 2d at 473, note 3.

moving too rapidly through the various markets and avoid clogging the processing facilities of the buying companies. When clogging occurs some buyers withdraw from the market because of inability to process purchases. This results in less competitive bidding to the detriment of farmer producers.

At Douglas, each of the two sets of buyers can purchase a maximum of only 2,200 baskets per day (400 baskets per hour times 5½ hours). Thus total market maximum is 4,400 baskets per day, or 11 hours of auction time.

5. Total available selling time is thus fixed by forces wholly beyond the control of respondent Board and must be divided among all warehouses on the market. For example, one warehouse may receive one hour of selling time per day, another 45 minutes, etc. The total, however, cannot exceed 11 hours per day.

Finally, the total amount of tobacco sold on the market as a whole is not and cannot be affected by the number of firms, warehouses or total floor space.

D. *Systems of Allocating Selling Time.* Various methods of apportioning the limited amount of total selling time among individual warehouses have been used on tobacco markets.

1. *Wall to wall system.* If, for example, there are three warehouses on the market, each is assigned a number and lots are drawn. The warehouse getting No. 1 position obtains the first sale when the market opens and is allowed to sell until it runs out of tobacco, which may take several days. The buyers then move

to the warehouse which has drawn No. 2 position and purchase tobacco until there is none left, etc.[4]

2. *Floor space system.* This system was in effect on the Douglas market prior to the change in regulations of which petitioner complains. It is described in detail, together with its adverse economic effects, in *Wilson Tobacco Board of Trade*, FTC Dkt. 6262, supra note 2. See infra pp. 16-17. Pursuant thereto a warehouse is given an amount of selling time on a daily basis determined by the ratio between its square footage and the total for the market. For example, if a warehouse has 100,000 square feet and all warehouses have a total of 1,000,000 square feet, it would receive 10% of the daily selling time. If the market has 11 hours selling time, the warehouse would receive 10% of 11 hours, or 66 minutes per day. Likewise, if one warehouse has 50% of the floor space it would receive 50% of the sales time, and the remaining warehouses would have to divide the other 50%. Under this system there is no way by which a warehouse's basic selling time may be increased from year to year except by the construction of additional space.

3. *Unit system.* Under this system, the available selling time is divided equally among all warehouses on the market. Thus, if there are 10 warehouses each will receive 1/10 of the available time. When this method is used, it is usually provided that a new warehouse will not receive any additional basic selling time

[4] This system has proved undesirable because neither a warehouse nor a farmer knows when a sale will be conducted at a particular warehouse. Under this system it is not necessary to make special provisions for the allocation of selling time to new warehouses. Moreover, it is not possible for a warehouse to increase its selling time from year to year based on its past performance.

for space in excess of the average of all warehouses on the market. This system was adopted by respondent Board and petitioner bases its claim in part upon this change. Under this system, standing alone, there is no provision for increasing or decreasing a warehouse's selling time from year to year. However, by separate regulation this may be accomplished by the "performance" rule which was also adopted by the Douglas Board.

4. *Performance rule.* The basic allotment to each warehouse at the beginning of each year depends on its sales in the preceding year. Thus, if Warehouse A in 1955 sold 10% of the total number of baskets, it would receive a basic allotment of 10% of the selling time for the ensuing year. The performance rule determines only *basic* selling time, not *actual* selling time.

This rule depends for its operation on "free time". "Free time" results when portions of the limited selling time available to the market as a whole are not used by individual warehouses because they do not have sufficient tobacco on their floors. When this occurs other warehouses which need more time to sell all their tobacco obtain additional time. Thus actual selling time available to an individual warehouse consists of its basic allotment plus free time. The patronage of farmers determines actual selling time. The determination of basic selling time for the next year depends on *actual selling time used*, which may be more or less than the basic allotment for the past year. The Douglas regulations provide that the extent to which free time may be credited and unused time deducted in determining the basic allotment for the next year is limited by a 3½%, "gain-or-loss" proviso, which simply means that no warehouse may either lose or

gain more than 3½% of its previous base allotment in any one year. Petitioners base their claim in part upon this "gain-or-loss" proviso.

E. *Proceedings Below.* The ultimate substantive issue in this case is exactly the same as presented in many others: Is the allotment to a newcomer and the method of thereafter determining the selling time of each warehouse on a year-to-year basis reasonable and fair under all the circumstances?

Petitioners claim that merely because they built a warehouse having 36.36% of total market floor space they were automatically entitled to 36.36% of the selling time. This simple but superficial basis for claiming selling time (floor space system) has been held by the Federal Trade Commission to be subversive of principles of free competition.[5]

The trial court found that if petitioners were allotted the 36.36% claimed, they would "obtain four times as much selling time as five of the existing warehouses and twice as much as the existing sixth warehouse" (1-R. 103). Its ultimate holding was:

[5] "Under the floor space system, the only competition was in capital resources. One who could afford it, could build and build, increasing his selling time and, therefore his business, at the expense of those who could not afford to build in retaliation. Obviously, this favored the wealthy—the poor operator would soon be out. This produced an uneconomic waste of capital—and unnecessary and unused warehouse floor space so strikingly demonstrated on the Wilson market from 1939-1952 as hereinafter found. Furthermore, it discourages, if indeed, it does not kill, competition in service, which is all the warehouseman has to sell, and which is therefore, or should be, his sole competitive battlefield. The real control over the market then, is not where it should be the farmer—but where it should not be, financial resources." *In The Matter of Wilson Tobacco Board of Trade*, FTC Dkt. 6262, Initial Decision, December 20, 1955, p. 22, affirmed by order and opinion, August 23, 1956.

> Defendants were not obligated to allow plaintiff to enter the Douglas market and capture at one stroke, without any sales effort whatsoever, over one-third (36.36%) of the available selling time; they were obligated to allow plaintiffs entry to the market with a reasonable amount of selling time; the 14.28% (i.e., one-seventh) of total available time allowed to plaintiffs, there being seven warehouses including the warehouse of plaintiffs, was reasonable (1 R, 106).

The Circuit court affirmed:

> The most directly pertinent decisions then available by which the Board of Trade might chart its course were those which we have discussed. Under those decisions, we think that it was not unreasonable for the Board of Trade to conclude that the allotment to the newcomer of more than one-third of the total available selling time was inequitable, and instead to allot to it one-seventh of such time, leaving six-sevenths thereof for apportionment among the six other warehouses in accordance with their performances during the preceding year[6] (244 F. 2d at 481).

However, the circuit court remanded the case for trial with respect to the gain-or-loss proviso, which provided that no warehouse could have an increase or decrease in base selling time of more than 31⅔% of the time allotted for the previous year.

---

[6] "There was already a surplus of warehouse floor space on the Douglas market and we think that the newcomer was entitled to no special consideration because of the unusual size of his warehouse." (Footnote by court.) As early as 1950 total warehouse capacity in the flue-cured area "was practically four times market capacity." Reference cited by petitioner (Pet. 19), U.S. Dept. of Agriculture, Marketing Research Report No. 101, Sept. 1955, p. 12.

Following remand the case was tried. Both petitioners and respondents introduced substantial evidence concerning the reasons and effects of the 3½% limitation. The jury returned a verdict for the Board. At trial, petitioners excepted to only *one* of the trial court's jury instructions—an instruction as to interstate commerce (2 R. 610-620).

Petitioner again appealed, relying on seven points (2 R. 621-2), the first four of which dealt solely with the trial court's instructions concerning interstate commerce.[7]

The circuit court again reversed and remanded for a new trial on the ground that the trial court should instruct the jury that as a matter of law sale of tobacco at auction is in interstate commerce (266 F. 2d at 644).

ARGUMENT

I. PETITIONERS MERELY SEEK TO DENY RESPONDENTS TRIAL BY JURY

The real thrust of petitioners' argument is to deprive respondents of a trial by jury and have this Court decide all issues of fact and law and then remand the case for determination of damages only.

The Court below, in remanding for a new trial, stated:

> It is a question for the jury to decide as to whether the 3½ per cent limitation, as construed

[7] Petitioners' fifth point related to the striking of certain testimony, but was abandoned; the sixth claimed prejudicial effect on the jury resulting from undue repetition of plaintiffs' burden of proof. By their seventh point petitioners merely tried to re-open and obtain reconsideration of the holdings of the circuit court on the first appeal that the initial allotment to petitioners of 14.28% was reasonable (2 R. 621-2).

and applied constitutes an *unreasonable* restraint of trade or commerce within the meaning of the Sherman Anti-Trust Act. That is, of course, a mixed question of law and fact, but its resolution, under appropriate instructions, difficult as they may be, must ultimately be left to the jury [citing cases] 266 F. 2d at 643.

But petitioners say:

> They [petitioners] submit, therefore, that they should not be subjected to the expense and inconvenience of another trial . . . (Pet. 20).
>
> * * *
>
> No jury [s]hould be permitted to grant its neighbors dispensation from the commands of the Sherman Act . . . The only question open is the extent to which petitioners have been damaged . . . (Pet. 25).

No jury has granted "dispensation". Petitioners sought a new trial and prevailed. Not content with a successful appeal, they now attempt to build a case for certiorari on the untenable assumption that in a new trial the jury will disregard the law and facts, and that the trial judge will permit this.

Petitioners argue further: ". . . We believe the restraints exposed on this record are unreasonable *per se*, and *too* plain and glaring to present a question of fact for a jury" (Pet. 26). Thus petitioners, in effect, seek a directed verdict from this Court although they did not seek one from the trial court.

---

[8] Cf. *Public Service Commission* v. *Brashear Lines*, 306 U. S. 204, 206 (1939).

A. Petitioners Are Foreclosed From Urging a Per Se Rule

Petitioners are foreclosed from now urging the adoption of a *per se* rule by the prior proceedings in this case. They themselves specifically asked the trial court to apply the test of reasonableness, and this was exactly what the court did. Petitioners submitted the following proposed instruction:

> In determining this question you [the jury] may consider the history of the 31½ per cent limitation, the evil believed to exist, the reason why this limitation was adopted and the purpose of the limitation. (2 R. 189).

Petitioners thus stand in the anomalous position of now contending that it was "a disservice to the memory of the author of the *Chicago Board of Trade* opinion" (Pet. 22) for the court below to apply the test of reasonableness whereas they themselves proposed application of the test of reasonableness in language almost identical to the formulation of that test in the *Chicago Board of Trade* opinion, 246 U.S. 231, 238 (1918).

B. The Courts and Federal Trade Commission Are Unanimous in Applying a Test of Reasonableness

All tribunals which have heretofore considered the regulations of tobacco markets governing the allocation of selling time have followed the test of reasonableness in determining legality or illegality. Thus, the Federal Trade Commission in the *Asheville Tobacco Board of Trade* case, Dkt. 6490, said:

> There is no dispute here as to the legality and reasonableness of the "performance" method of

> allocating selling time on the Asheville tobacco market. In fact, the Commission has sustained the intrinsic legality of such a method in a recent proceeding involving another North Carolina tobacco auction market. *In the Matter of Wilson Tobacco Board of Trade*, FTC Dkt. 6262 (decided Aug. 23, 1956). And the courts have likewise upheld the adoption of the "performance" method of allocating selling time. [Citing, *Day* v. *Asheville Board of Trade*, 242 N.C. 136, 87 S.E. 2d (1955); *Rogers* v. *Douglas Tobacco Board of Trade*, 244 F. 2d 471 (C.A. 5, 1957)] (Opinion, Feb. 14, 1958, p. 4).

In the *Wilson* case, Docket No. 6262, the Commission said:

> Weighing and judging the reasonableness of the performance system in the light of its intent and effect, and in the framework of realities of the market place, as established on the record here, there remains no alternative but for us to conclude on the whole record that the initial decision is correct in upholding the reasonableness of the performance system. (Opinion August 23, 1956, p. 5).

The Fourth Circuit, in *Asheville Tobacco Board of Trade* v. *FTC*, 263 F. 2d 502, 511 (4th Cir. 1959), held that whether a regulation respecting entry is illegal ". . . depends upon the significance of the restraint in relation to the particular [tobacco] market under investigation."

The opinions of the court below are, of course, in full accord with these statements. 244 F. 2d at 478-79; 266 F. 2d at 643.

C. This Case Presents Complex and Disputed Factual Questions

The complex facts and circumstances surrounding the operations of tobacco markets present numerous factual issues.

At trial much detailed evidence was adduced by both petitioners and respondents. This evidence falls in two main categories: (1) actual effects of the 3½% limitation and (2) economic and practical reasons for its adoption in light of the complicated market mechanics and the many other regulations of the market by forces outside the control of respondents.

As to effects, petitioners elicited testimony from two economists concerning actual and potential effects of the 3½% provision upon the operations of the market. (2 R. 428 et seq.; 547 et seq.) Similarly, respondents offered conflicting evidence as to the effects on the market (e.g., 2 R. 468 et seq.), together with the reasons for adoption of the provision (e.g., 2 R. 473-474, 585-587).

Also, petitioners adduced evidence calculated to show that the basic selling time controls to a very substantial degree the actual amount of business a warehouse does (e.g. Pet. 7). Respondents introduced substantial evidence to the contrary showing, for example, that the largest firm on the market with 23.8% of the base selling time sold only 15.9% of the total tobacco, while petitioners sold 19.3% of the total tobacco with a basic allotment of 14.28% (Def. Ex. 26, 2 R 633). Again, petitioners at trial attempted to prove that the market is frequently blocked, i.e., more tobacco is brought to the market in one day than can be sold, and that under such conditions a farmer has no choice

as to the warehouse he will sell with (e.g. Pet. 7), respondent offered contrary evidence (2 R. 504-505, 633-634). Also, petitioners put in evidence from which they purport to "calculate" that it would take petitioners 27 years to obtain 36.36% of the selling time which they claim (Pet. 14-15). Respondents put in evidence to rebut this argument (2 R. 633-634).

On reasons for adoption, petitioners put in evidence from which they argue that the 3½% limit was aimed solely at them. Respondents put in substantial evidence to show the contrary, for example, that the provision affected some of the existing warehousemen as much as or more than petitioners (2 R. 589-590); that such a limitation was reasonable and necessary because of the unique facts concerning the auction system (e.g., 2 R. 468 et seq.). It was this and other evidence which prompted the court below to state on the second appeal:

> The testimony in the present case tends to sustain the Fourth Circuit's view that some limitation on the percentage of gain or loss in any one year is reasonable, and, we think, that question, together with the reasonableness of the particular 3½ per cent limit, as construed and applied by the defendants, must be left to the jury under proper instructions. 266 F. 2d at 644.[9]

---

[9] The Fourth Circuit, in reviewing an extensive record in a Federal Trade Commission proceeding, held that there are "a number of reasons why it may be desirable that there be some limit on the possible gain or loss to an individual warehouse in a single year" and, while the court condemned the particular limit there involved under the particular circumstances, it further held that a "reasonable limitation" would not violate the antitrust laws and that the "order of the Commission does not prevent a reasonable limitation." (263 F. 2d at 511).

The court below, in remanding for a new trial as requested by petitioners, stated: "It is a question for the jury to decide as to whether the 31½ per cent limitation as construed and applied constitutes an *unreasonable* restraint of trade or commerce within the meaning of the Sherman Anti-Trust Act." 266 F. 2d at 643.

The question of construction and actual application of the regulation is at issue. Petitioner belabors the question as to whether the 31½% regulation was actually followed and whether all warehousemen were treated the same (Pet. 10-15). Respondents offered evidence as to the construction and application of the regulation and equality of treatment (e.g., 2 R. 493).

Respondents submit that this Court should not grant the writ and thereby deprive respondents of their right to trial by jury merely because petitioners profess a fear that the jury will give respondents "dispensation" or on the strained afterthought that what *may* be factually found to be unreasonable is somehow "*per se* unreasonable" without submission of all the relevant facts to a jury with proper instructions. Cf. *Southern Power Company* v. *North Carolina Public Service Company*, 263 U.S. 508 (1924).

D. The Court Below Correctly Applied the Test of Reasonableness

Petitioners attempt to present an over-simplified issue. They claim 36.36% of the selling time based upon one simple proposition, namely, petitioners built a warehouse containing 36.36% of total market warehouse floor space. The Board changed the regulations and allotted petitioners 14.28%. This, it is argued, is unreasonable as a matter of law.

But, say petitioners inconsistently, "When entry . . . is permitted on a fair basis, a new rule is not necessarily bad simply for being new" (Pet. 22). It, therefore, does not help petitioners to talk in terms of "unreasonableness *per se*" and attempt to fit their case into the pattern of such cases as *Fashion Originators Guild* v. *FTC*, 312 U.S. 457 (1941), and *International Salt Co.* v. *U. S.*, 332 U.S. 392 (1947) (Pet. 22). The Federal Trade Commission has held that the very basis upon which petitioners claim 36.36 i.e., that they own that much floor space in relation to total floor space, is monopolistic in its tendencies, inimicable to the public interest and particularly the interest of farmers patronizing the market. Thus, in the *Wilson Tobacco* case, where the issue was whether the Wilson Board had acted arbitrarily and unreasonably toward newcomers by discarding the floor space system of allocating selling time; the Commission affirmed the following finding of the hearing examiner:

> Under the floor space system, the only competition was in capital resources. One who could afford it, could build and build, increasing his selling time and, therefore his business, at the expense of those who could not afford to build in retaliation. Obviously, this favored the wealthy—the poor operator would soon be out. * * * Furthermore, it discourages, if indeed, it does not kill, competition in service, which is all the warehouseman has to sell, and which is therefore, or should be, his sole competitive battlefield. The real control over the market then, is not where it should be—the farmer—but where it should not be, financial resources. (*In the Matter of Wilson Tobacco Board of Trade*, FTC Dkt. 6262, Initial Decision, p. 22.)

Petitioners complain that in entering the market they relied upon rules which were changed by respondents coincident with their entry. The basic contention is that the Board was legally bound to do nothing and by merely covering acres with a roof petitioners should obtain over one-third of the market. If this be so, any builder with financial resources could capture 70% or 80% of the market with dollars alone and drive out competitors. Without regulation to prevent this, the result is "butting dollar against dollar" by all warehousemen to construct unneeded floor space in an effort to retain selling time with the consequent elimination of smaller operators with less capital.[10]

With respect to the change of rules the circuit court held:

> The allocation of selling time among the local warehouses, as has been shown, was a necessity. So long as they were in unanimous agreement there was no objection to the "Unit Floor-Space System." With the advent of a new and powerful competitor, no agency existed for the necessary allocation of time except the Douglas Board

[10] *In the Matter of Wilson Tobacco Board of Trade*, FTC Dkt. No. 6262. The Department of Agriculture has concluded that their "study has shown that the rules for distributing selling time and other rules limiting the sales have led to increases in facilities" and that "a method such as the present one, which induces the operators to overexpand their facilities, decreases the efficiency and adds unnecessary costs." The Department adds that the answer does not lie in doing away with regulation because this "would lessen competition" and that regulation is "necessary to promote orderly and efficient marketing of the tobacco and competition among the buyers." Reference cited by petitioners, The Auction Marketing of Flue Cured Tobacco: A Preliminary Appraisal, Department of Agriculture, Marketing Research Report No. 101, Sept. 1955, pp. 51-52.

> of Trade. The time within which it had to take action was brief. Construction of the new warehouse began in May. Various, albeit heated, discussions ensued. The warehouse was completed the last of June, and the new by-law adopted the 10th of July, five days before the opening of the 1954 season. *The plaintiffs themselves, by the timing of their project, bear the primary responsibility for the extremely brief period of time within which action by the Board of Trade became necessary* (emphasis added). 244 F. 2d at 471.

Even petitioners, we believe, would not contend that they should be allowed to capture 70% or 80% of the market by merely building. They admit that "a new rule is not necessarily bad simply for being new" and that it is a question of fairness (Pet. 22). It is, indeed, a question of fairness—fairness to the market as a whole and the farmers who patronize it, fairness to petitioners and fairness to existing warehousemen.

And the circuit court held "that it was not unreasonable for the Board of Trade to conclude that the allotment to the newcomer of more than one-third of the total available selling time was inequitable, and instead to allot to it one-seventh of such time, leaving six-sevenths thereof for apportionment among the six other warehouses in accordance with their performances during the preceding year." (244 F.2d at 481).

Under all the facts and circumstances and upon the basis of the entire record it is clear that the circuit court's holding was not in error.

II. NO ISSUES OF WIDESPREAD SIGNIFICANCE ARE PRESENTED

This litigation is of little, if any, importance to any market other than Douglas. The reasonableness of regulations must be determined on a case to case basis, and no general rule is possible. There are some 95 markets situated throughout the South, each with its own set of rules. The circumstances surrounding the adoption and operation of particular systems for the allocation of selling time necessarily vary in each case.[11] Thus, in the *Wilson* case the Federal Trade Commission did not question the fairness of an allotment of 11.17% to a newcomer. Under the circumstances disclosed in the *Asheville* case, however, it tentatively held that an allotment of 8.33% was unfair.[12]

---

[11] See, e.g., *Day* v. *Asheville Tobacco Board of Trade*, 242 N.C. 136, 87 S.E. 2d 18 (1955), performance system together with application of unit system to entrants held valid; *Cooperative Warehouse* v. *Lamberton Tobacco Board of Trade*, 242 N.C. 123, 87 S.E. 2d 25 (1955), regulation permitting the transfer of sales time from one warehouse to another by owner or operator or both held valid as to market on floor space system, although there was an excess of floor space on the market as a whole; *Kinston Tobacco Board of Trade* v. *Liggett & Myers Tobacco Co.*, 235 N.C. 737, 71 S.E. 2d 21 (1952), board of trade cannot require manufacturer to furnish additional buyers; *Bright Belt Warehouse Ass'n* v. *Tobacco Planters Warehouse*, 231 N.C. 142, 56 S.E. 2d 391 (1949), warehouse association lacked authority to prohibit auction sales because of absence of specified number of buyers; *Gray* v. *Central Warehouse Co.*, 181 N.C. 166, 106 S.E. 657 (1921), board of trade not authorized to prohibit nonmembers of board from buying at auction sales; *In the Matter of Wilson Tobacco Board of Trade*, supra, note 2, performance system without limitation held reasonable but entry provision based on time allotted last entrant held unreasonable.

[12] The Commission has recently reopened the *Asheville* case for the reception of further evidence. FTC Dkt. No. 6490, Order, July 20, 1959.

Whether the questioned regulation is unreasonable is a mixed question of law and fact which necessarily must "depend on appreciation of circumstances which admit of different interpretations." See *FTC* v. *American Tobacco Co.*, 274 U.S. 543, 544 (1927); *NLRB* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 503 (1951); *U.S.* v. *Johnston*, 268 U.S. 220, 227 (1925). Thus, the Fourth Circuit held that whether a regulation is reasonable "depends on the significance of the restraint in relation to the particular market under investigation." *Asheville Tobacco Board of Trade* v. *FTC*, 263 F.2d 502, 511 (4th Cir. 1959). Both the FTC and the Fifth Circuit agree.

III. NO CONFLICTING DECISIONS

Petitioner does not point to any conflict among the lower courts as a ground for the granting of the writ. Instead, petitioners belabor what they conceive to be a "shift in positions" of the lower court on the second appeal. Even assuming the validity of petitioners' assertion, it is well settled that a lower court may always review and modify or correct its own decisions. *Messinger* v. *Anderson*, 225 U.S. 436 (1912).

However, a fair reading of the two opinions of the court of appeals fails to disclose any inconsistency. In the second appeal the circuit court devoted the majority of its opinion to the precise question presented, namely, whether the trial court's instructions concerning interstate commerce were correct. After deciding that issue for petitioners, the court stated that its dicta in its first opinion concerning the 3[1]/2% gain or loss proviso should not be permitted to influence the jury's verdict (266 F.2d at 643). The court amplified its earlier dicta on the basis of evidence taken at

trial. Both opinions make it clear, however, that the final determination is for the jury. Finally, obviously anticipating a retrial pursuant to its remand, the circuit court called the trial court's attention to *Klor's* v. *Broadway-Hale Stores*, 359 U.S. 207 (1959), which was decided after all briefs to the circuit court were filed (266 F. 2d at 644).

Out of this petitioners attempt to create an impression of inconsistency, vacillation and failure of the circuit court properly to discharge its duties. This is unwarranted. In any event, petitioners' entire position is of necessity predicated upon an assumption that upon retrial and possible further review by the circuit court error will be committed.

IV. NO CONFLICT WITH DECISIONS OF THIS COURT

Petitioners repeatedly cite *Klor's* v. *Broadway-Hale Stores*, 359 U.S. 207 (1959). Petitioners' argument is not clearcut. At one point it appears to be that the circuit court evidences vacillation and inconsistency by clarifying its first opinion in connection with "public interest."[13]

Clarification by a circuit court of a former opinion in the light of a subsequent opinion of this Court hardly satisfies Rule 19(6) of this Court, and especially where there is as yet no final judgment, such clarification being merely dicta.

Elsewhere in their brief, however, petitioners erroneously suggest that the court below has not "fully given effect to the thrust of the *Klor's* holding" (Pet. 26). Significantly, however, at no point do petitioners

[13] The first opinion below was rendered prior to the *Klor's* decision.

contend that the lower court's interlocutory opinion is inconsistent with or contrary to *Klor's*.

Petitioners' justification for seeking a writ boils down to this: Upon remand the trial court *may not* follow *Klor's*, a verdict *may be* rendered against petitioners, petitioners *may have* to seek review in the circuit court, and the circuit court *may not* follow *Klor's*. Therefore, the case should be tried and decided *de novo* by this Court, or at least, say petitioners, "This Court [should] strip off the verbal barnacles that have too long impeded the proper determination of so many Sherman Act cases" (Pet. 26) and render an anticipatory advisory opinion before the entry of any final judgment below, solely on the speculation that the trial court or court of appeals, or both, may misinterpret *Klor's*. Cf. *Busby* v. *Electric Utilities Employees Union*, 323 U.S. 72, 75 (1944); *Triplett* v. *Lowell*, 297 U.S. 638, 648-9 (1936).

In any event, this suggestion of petitioners is surprising since the circuit court gave full effect to *Klor's*, 266 F. 2d at 644.

Petitioners also argue that, in the after-light of *Klor's*, the trial judge's reasoning was "infected" (Pet. 26), but the record facts resound against them and they are even foreclosed from raising this issue. The trial court, long prior to *Klor's*, gave the jury an instruction on "public interest" almost identical to the charge requested by petitioners:

> *Petitioners' requested charge:* "In other words, you [the jury] are to determine whether the 3[d] limitation tends to prejudice the public interest or whether it did not tend to prejudice the public interest." (2 R. 189).

Court's charge: "I further charge you that in order to carry their burden of proof, the plaintiffs must prove . . . . . Second, that the three and one-half percent limit prejudices or tends to prejudice the public interest." (2 R, 600).

Understandably, petitioners did not except to the above charge or raise any issue with respect thereto on appeal (2 R, 261-2).

The trial court having given the charge requested by petitioners themselves, petitioners cannot now be heard to criticize the trial court, especially where, as here, no issue with respect to "public interest" was raised in the circuit court and the case has been remanded for retrial. See *American Construction Co. v. Jacksonville, T. & K. R. Co.*, 148 U.S. 372, 384 (1893).

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

WILLIAM SIMON
HAROLD F. BAKER
of Howrey & Simon
1707 H Street, N.W.
Washington 6, D. C.

E. KONTZ BENNETT
Post Office Box 178
Waycross, Georgia

MONTGOMERY PRESTON
118 East Ashley Street
Douglas, Georgia

Attorneys for Respondent

August 28, 1959

ILE COPY

Office-Supreme Court, U.S.
FILED
1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 260

B. B. ROGERS, B. S. CORRELL, W. O. NEWELL, ET ALS.,
Petitioners,

v.

THE DOUGLAS TOBACCO BOARD OF TRADE, INC.,
a corporation, *et als.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' SUPPLEMENTAL MEMORANDUM

NORMAN M. LITTELL,
1826 Jefferson Place, N. W.,
Washington 6, D. C.,
Counsel for the Petitioners.

FREDERICK BERNAYS WIENER,
1025 Connecticut Avenue, N. W.,
Washington 6, D. C.,

CHARLES J. ALEXANDER,
1826 Jefferson Place, N. W.,
Washington 6, D. C.,

JOHN G. KOPP,
J. EDWIN PEAVY,
408 Bunn Building,
Waycross, Georgia,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 260

B. B. ROGERS, B. S. CORRELL, W. O. NEWELL, ET ALS.,
Petitioners,

v.

THE DOUGLAS TOBACCO BOARD OF TRADE, INC., a corporation, *et als.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' SUPPLEMENTAL MEMORANDUM

The character of the respondents' opposition necessitates the submission of a few clarifying words in reply.

1. At the trial that followed the first appeal, petitioners were under the compulsion of the "law of the case" enunciated by the first opinion below (2 R. 206-210). They were therefore not free to make the basic contention, advanced on the first appeal and now renewed, that the restraint of trade proved on the present record entitled them to judgment as a matter of law.

2. Similarly, on the second appeal petitioners unsuccessfully urged the court below to reverse its first opinion, which had totally excluded from consideration the effect on competition of the change made in respondents' by-laws five days before petitioners entered into their first market season—although such by-laws had previously been in effect for 36 years.

3. In our view, which is set forth in the petition at length and hence will not be repeated now, the change in respondents' by-laws so stifled competition beyond possibility of argument or contradiction that only a question of law remains on this record.

4. Respondents' attack on the foregoing conclusion is based on assertions that lack record support.

Thus, respondents assert that there is evidence in the record to rebut petitioners' computation that it would take them 27 years to obtain 36.36 per cent of the selling time on the Douglas market (Br. Opp. 14). There is no such evidence. Respondents cite "(2 R. 633-634)", but examination of that reference reveals nothing more than two charts showing total poundage sold by the several warehouses.

Those charts bear no relationship whatever to petitioners' demonstration that it would take them over 27 years to attain to the competitive position that would have been theirs under the by-laws that had been in effect for over a generation prior to their entry into the market.

Similarly, respondents assert that on blocked days the farmers had a choice as to warehouses (Br. Opp. 13-14). But respondents' own testimonial admissions establish precisely the contrary (2 R. 504, 523).

5. Consequently, we believe that we are on solid ground in contending that on the present record there is nothing for a jury to decide any more than there remained a factual issue in *Associated Press* v. *United States*, 326 U.S. 1,

6. But even if we should be wrong, even if conceivably a material or significant issue of fact were in some manner still required to be litigated, we submit that such litigation should not be had until after this Court has reviewed the conflicting holdings below and clarified the standards and the rules of law to be applied at a retrial. Petitioners believe that they should not be forced to retry the facts until this Court has authoritatively formulated the governing principles, as the court below assuredly has not done despite two appeals.

7. While we believe that this case warrants review for the reasons already stated, and because of its impact on auction sales of tobacco throughout the country (Pet. 19), it is appropriate to emphasize that notwithstanding respondents' suggestion to the contrary (Br. Opp. 20), there is in fact a conflict between the Fourth and Fifth Circuits as to the proper approach, so that the growers and sellers of flue-cured tobacco in Georgia are governed by a rule different from that which now governs other growers and sellers of the same tobacco in the Carolinas.

A. The court below on the first appeal condemned the 3½% limitation (Pet. App. A20-A21); the Fourth Circuit in *Asheville Tobacco Board of Trade, Inc.* v. *F.T.C.*, 263 F.2d 502, 512, similarly condemned such a limitation on authority of that decision; and then the court below in a change of heart decided on the second appeal that the effect of the 3½% limitation presented a jury question (Pet. App. A35-A36).

B. The Fourth Circuit said (263 F.2d at 511) that "The evidence clearly supports the condemnation of the new warehouse provision in connection with the 3½% gain or loss proviso," while the court below on the second appeal held (Pet. App. A38) that whether the combination of the two was unreasonable presented a jury question.

C. The court below on both appeals held that the new warehouse provision was reasonable as a matter of law

and hence lawful (Pet. App. A13-A15, A37-A38), while th Fourth Circuit held, differing from the Federal Trade Co mission (263 F.2d at 511), that the effect of the new war house provision, standing alone, was unclear.

Plainly, then, clarification by this Court of the principle involved is well night imperative.

8. Accordingly, we urge the Court to grant the petitio for certiorari in this case.

Respectfully submitted.

NORMAN M. LITTELL,
1826 Jefferson Place, N. W.,
Washington 6, D. C.,
Counsel for the Petitioners.

FREDERICK BERNAYS WIENER,
1025 Connecticut Avenue, N. W.,
Washington 6, D. C.,

CHARLES J. ALEXANDER,
1826 Jefferson Place, N. W.,
Washington 6, D. C.,

JOHN G. KOPP,
J. EDWIN PEAVY,
408-410 Bunn Building,
Waycross, Georgia,

Of Counsel.

SEPTEMBER 1959.